Supreme Court, U.S.
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No.

In the
Supreme Court of the United States

ROBERT MACDONALD, CAREN CRONK THOMAS and WINDY CITY HEMP DEVELOPMENT BOARD,

Petitioners,

vs.

CITY OF CHICAGO,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

I. Is a content-neutral ordinance that prohibits core political speech in a traditional public forum without government permission analyzed as a prior restraint or under the more deferential standard applicable to time, place and manner regulations?

II. When a permit for core political speech in a traditional public forum is denied, does immediate access to the courts constitute prompt judicial review, without regard to the length of time allowed for a judicial decision?

III. Must an ordinance requiring a permit for core political speech in a traditional public forum include each of the three procedural safeguards established in *Freedman v. Maryland*, 380 U.S. 51 (1965)?

IV. Can an ordinance requiring a permit for core political speech in a traditional public forum include unfettered discretion to issue or withhold permits?

PARTIES TO THE PROCEEDING

The Petitioners, who were Appellees and Cross-Appellants in the Seventh Circuit, are Caren Cronk Thomas and Windy City Hemp Development Board, an Illinois not-for-profit corporation. The original Plaintiff in the District Court was Robert MacDonald, who died while this case was on appeal to the Seventh Circuit. Thomas and the Board were allowed to substitute as parties after MacDonald's death.

The Respondent is the City of Chicago, the Defendant in the District Court and the Appellant and Cross-Appellee in the Circuit Court.

Except as stated above, all parties to the proceedings below are parties to this Petition.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, Counsel for the Petitioners inform this Court that Windy City Hemp Development Board has no parent or subsidiary corporations, and no publicly owned company holds any ownership interest in the corporation.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit, reported at 243 F.3d 1021, is reproduced at Appendix A. The unreported opinion of the United States District Court for the Northern District of Illinois on cross-motions for summary judgment, found at 1998 WL 673652, is Appendix B. The unreported opinion of the District Court denying the City's Motion to Alter Judgment, found at 1998 WL 748350, is Appendix C. The unreported opinion of the District Court denying the City's Emergency Motion to Vacate Injunction, found at 1999 WL 102775, is Appendix D.

JURISDICTION

The Court of Appeals entered its judgment on March 12, 2001. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Constitutional provisions

The First Amendment to the Constitution of the United States of America provides that "Congress shall make no law . . . abridging the freedom of speech . . . ."

Statutory provisions

§ 10-8-330 of the Chicago Code of Ordinances establishes a permit scheme for holding a parade on any of the City's streets or sidewalks. The Ordinance, an appendix to the decision of the Court of Appeals, 243 F.3d

at 1042-49, is reproduced as Appendix E to this Petition. App. at 104a.

STATEMENT OF THE CASE

A City of Chicago ordinance requires anyone planning to hold a "march, procession or other similar activity" on any public way to first obtain a permit from the Department of Transportation. App. at 104a-105a.[1] The permit is to be granted only if the Commissioner of Transportation finds *each* of the following:

> (1) The proposed activity will not substantially or unnecessarily interfere with traffic in or contiguous to the activity, or that, if the activity will substantially interfere with such traffic, that there are available at the time of the proposed activity sufficient city resources to mitigate the disruption;
>
> (2) There are available at the time of the parade, public assembly or athletic event a sufficient number of peace officers to police and protect lawful participants in the activity and non-participants from traffic related hazards in light of the other demands for police protection at the time of the proposed

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1. After the district court granted partial summary judgment for Robert MacDonald, the City amended the permitting ordinance. All references in this Petition are to the Ordinance as amended, unless otherwise noted.

> event or activity;[2]
>
> (3) The concentration of persons, animals, vehicles, or things at the assembly and disbanding areas and along the parade or athletic event route will not prevent proper fire and police protection or ambulance service;
>
> * * *
>
> (8) The application contains sufficient information about the proposed route and crowd estimate to enable the commissioner to evaluate the proposed event under this section. App. at 108a-109a.

The Commissioner is required to rule on the application within two business days after its filing. If the application is denied, the Commissioner must give notice to the applicant, stating the facts and reasons for the denial.[3] An applicant may appeal a denial within two days. If a notice of appeal is filed, the License Commission must hold a hearing within three business days, and based upon the evidence contained in the record of the hearing, "either affirm or reverse the decision of the commissioner of transportation" within two business days of the

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2. This section was the only one significantly changed when the ordinance was amended.

3. The Commissioner has construed this provision as only requiring him to list the reasons for denial mimicking the exact language of the ordinance, without providing any underlying facts.

conclusion of the hearing. The decision of the Commission "shall be subject to judicial review in accordance with applicable law." App. at 109a-110a.

In June of 1997 Robert MacDonald applied for a permit to conduct a parade in the central business district of Chicago on August 23rd.[4] That application was denied. MacDonald filed suit. After he filed an Application for Preliminary Injunction, discussions between counsel resulted in an agreement allowing MacDonald to conduct the parade he sought on a slightly different route.

The parties filed cross-motions for summary judgment on the validity of the ordinance. While those motions were pending, MacDonald applied for a permit for a parade on May 9, 1998. Again, his application was denied. MacDonald again filed a second Application for Preliminary Injunction. Discussions between counsel resulted in a second agreement allowing a parade on that date along a different route.

On September 23, 1998, the district court granted in part and denied in part each party's Motion for Summary Judgment. App. at 51a. The court found the portion of the ordinance allowing denial of a permit because of an "insufficient number of peace officers to police and protect lawful participants in the activity" to be unconstitutional because it allowed the Commissioner to base his decision on the content of the proposed message of the event.

The court also found the ordinance to be an

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4. Before his death, "Robert MacDonald was a vocal advocate for the legalization of marijuana." App. at 7a.

unconstitutional prior restraint because it did not provide all of the procedural safeguards required by *Freedman v. Maryland*, 380 U.S. 51 (1965) and *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990). The court said the ordinance was invalid because it did not require the City to seek judicial review of its decision to deny a permit, or to bear the burden of proof in the judicial proceeding.

The City filed a Notice of Appeal, amended the ordinance, and asked the district court to alter and vacate its injunction enjoining the enforcement of those portions of the ordinance the court had found unconstitutional.[5] The court declined, finding that the amendments did not correct the constitutional infirmities of the ordinance. App. at 83a, 94a.

On March 12, 2001, a divided panel of the Seventh Circuit found the ordinance constitutional in all respects. App. at 1a. In its opinion the Court held:

- An ordinance that requires a permit to engage in core political speech in a public forum is not analyzed as a prior restraint, but as a time, place and manner regulation, unless the ordinance specifically authorizes the permitting authority to engage in

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5. MacDonald filed a Cross-Appeal from those portions of the district court's decision rejecting his contentions that other portions of the ordinance also violated his First Amendment rights.

content-review;

- Access to judicial review is all that is required under *Freedman v. Maryland*, regardless of the length of time allowed in the judicial review process for a decision;

- the permitting authority is not required to initiate judicial review when it denies a permit, since this *Freedman* safeguard is not applicable to time, place and manner restrictions; and

- the Chicago permit ordinance does not confer unbridled discretion to grant or deny permits for parades on the City's streets and sidewalks.[6]

The panel also said that because the Commissioner is required to authorize an alternative time, location or route when he denies a permit, the ordinance allowed ample alternative avenues for the exercise of free speech. Finally, the panel concluded that Illinois' common law certiorari procedure for reviewing administrative actions

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6. The majority relied heavily on *Graff v. City of Chicago*, 9 F.3d 1309 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994), and on *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000), *cert. granted*, 2001 Lexis 3998.

is a constitutionally adequate vehicle for reviewing the City's denial of a parade permit.[7]

In her dissenting opinion, Judge Rovner concluded that the ordinance contains a "heckler's veto:"

> It is therefore easy to imagine that the City might deem even a small parade too great a threat to the orderly flow of traffic if the content of the parade strikes the City's regulators as controversial. In effect, under the Chicago ordinance, counter-protestors can apply their heckler's veto by threatening to show up in large numbers and create traffic hazards of their own.
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> App. at 48a.

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7. Under Illinois' common-law certiorari procedure the disappointed applicant must initiate the judicial proceeding and bear the burden of proving that the denial of a permit was improper. There is no requirement for the rendition of a prompt judicial decision.

REASONS FOR GRANTING THE WRIT

Core political speech – described in *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) as "the essence of self-government" – is in danger in the Seventh Circuit because of the decision in this case, and the decision in *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000). The right to engage in speech that occupies "the highest rung of the hierarchy of First Amendment values," *Carey v. Brown*, 447 U.S. 455, 467 (1980), now rests in the hands of an often hostile government.[8] Despite the " ' profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust and wide-

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8. Government hostility to political speech with which it does not agree and which it does not want to allow is evident in the myriad of cases in this Court and the lower federal courts, a list far too long to compile and reproduce here. *See, e.g., Shuttlesworth v. City of Birmingham*, 394 U.S. 147 (1969); *Saia v. New York*, 334 U.S. 558 (1948); *Kunz v. New* York, 340 U.S. 290 (1951); *Cantwell v. Connecticut*, 310 U.S. 296 (1940); *New York Times Co. v. United States*, 403 U.S. 713 (1971); *Connick v. Myers*, 461 U.S. 138 (1983); *MacDonald v. Safir*, 206 F.3d 184 (2nd Cir. 2000); *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000); *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999); *Bledsoe v. City of Jacksonville Beach*, 130 F. Supp. 2d 1358 (M.D. Fla. 1999). It is no coincidence that these Petitioners find it so difficult to obtain permits to express the message that marijuana laws must be reformed in a City whose mayor and administration have taken an unwavering stand against that message.

open,"[9] debate on public issues in the Seventh Circuit may be silenced by a simple refusal to grant a permit.

The speech in this case is core political speech – a message concerning a need for change in the nation's drug laws – in the archetypical public forum: the streets and sidewalks. *Hague v. CIO*, 307 U.S. 496 (1939). The method of speech is a parade. There can be no doubt as to the significance of a parade as political speech. As this Court said in *Hurley v. Irish-American Gay, Lesbian and Bisexual Group of Boston*, 515 U.S. 557 (1995):

> If there were no reason for a group of people to march from here to there except to reach a destination, they could make the trip without expressing any message beyond the fact of the march itself. Some people might call such a procession a parade, but it would not be much of one. Real "[p]arades are public dramas of social relations, and in them performers define who can be a social actor and what subjects and ideas are available for communication and consideration." S. Davis, Parades and Power: Street

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9. *N.A.A.C.P. v. Clairborne Hardware Co.*, 458 U.S. 886, 913 (1982) quoting from *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

> Theatre in Nineteenth-Century Philadelphia 6 (1986). Hence, we use the word "parade" to indicate marchers who are making some sort of collective point, not just to each other but to bystanders along the way . . . Parades are thus a form of expression, not just motion, and the inherent expressiveness of marching to make a point explains our cases involving protest marches.
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> 515 U.S. at 568.

Unless this Court grants review in this case, a political parade will occur in Chicago only if the City's bureaucracy decides to allow it to take place.[10] A simple denial, parroting the words of the ordinance (as the Commissioner routinely did with Robert MacDonald's parade requests) will certainly dissuade many from pursuing their right to expression under the First Amendment.[11] For those who persist and seek judicial

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10. Under the amended Ordinance, the Commissioner must offer an alternate date, time and/or route when he denies a permit. Of course, if the City can pick the date, time and route, the City can often effectively suppress the message by delaying it or separating it from its intended audience.

11. As Judge Rovner noted in dissent, "[i]t is therefore easy to imagine that the City might deem even a small parade too great a

(continued...)

review, the lack of a prompt judicial decision, and the length and cost of the litigation, will silence most of them. This Court cannot let such a grave situation exist.

I. A PERMIT SCHEME RESTRICTING CORE POLITICAL SPEECH IN A PUBLIC FORUM MUST BE ANALYZED AS A PRIOR RESTRAINT

Following the panel opinion in *Thomas v. Chicago Park District*, the panel in this case determined that Chicago's parade permit ordinance was not a prior restraint, but a time place and manner restriction. This places the Seventh Circuit in direct and irreconcilable conflict with at least two other circuits: the Second Circuit, in *Beal v. Stern*, 184 F.3d 117 (2nd Cir. 1999), and the Eleventh Circuit, in *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000), *pet. for cert. pending*, Docket No. 00-1503. And more importantly, it is in direct conflict with this Court's opinion in *FW/PBS*.

In *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215 (1990) this Court reviewed a licensing ordinance applicable to "sexually oriented businesses." The Court of Appeals for the Fifth Circuit had found the ordinance valid after applying a time, place and manner analysis.

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11. (...continued)
threat to the orderly flow of traffic if the content of the parade strikes the City's regulators as controversial." App. at 48a.

FW/PBS, Inc. v. City of Dallas, 837 F.2d 1298 (5th Cir. 1988). In so doing the Fifth Circuit rejected the appellants' claim that the ordinance must include the procedural safeguards from *Freedman v. Maryland*.

This Court granted review. Justice O'Connor, in a plurality opinion, wrote that any such permit scheme is a prior restraint. Justices Stevens and Kennedy joined the plurality. Justices Brennan, Marshall and Blackmun, in a concurring opinion, left no doubt that the ordinance was to be analyzed as a prior restraint. Therefore, six Justices of this Court concluded that Dallas' *content-neutral* licensing regulation, requiring a business to obtain city permission before engaging in free speech, was a prior restraint.

The panel in this case said that it was bound by the previous decision in *Thomas v. Chicago Park District*, 227 F.3d 921 (2000), and held that the ordinance was not a prior restraint because it "limits the discretion of the government based on content-neutral criteria . . . ." App. at 27a. This approach of considering the ordinance as a time, place and manner regulation flies directly in the face of this court's holding in *FW/PBS*.[12]

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12. The Seventh Circuit is determined to rewrite this Court's definition of prior restraint. In *Blue Canary Corp. v. City of Milwaukee*, 2001 WL 568473 (7th Cir. 2001), the Seventh Circuit has reiterated its heretical view that a prior restraint exists only when the

(continued...)

The decision is also in direct conflict with the Second Circuit's decision in *Beal v. Stern*. The trial court had determined that New York City's park permit ordinance was properly analyzed as a time, place and manner regulation. The Second Circuit reversed, holding that it was clearly a prior restraint on speech. Likewise, the Eleventh Circuit determined that the City of Gainesville's park permit ordinance was a prior restraint. *Cannabis Action Network, Inc.*, 231 F.3d 761 (11th Cir. 2000).

The difference between a prior restraint and a time, place and manner restriction is of great constitutional significance. A prior restraint comes to the reviewing court "bearing a heavy presumption against its constitutional validity." *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 558 (1975). The government bears a heavy burden to demonstrate that a prior restraint meets the requirements of the First Amendment. *Bantam Books,*

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12. (...continued)
government restricts speech based on content. Contrary to this Court's pronouncements that a prior restraint exists whenever one must seek permission from the government to speak at all, the Seventh Circuit persists in its claim that "prior restraints" which are not based upon overt governmental dissatisfaction with the message are merely time, place and manner regulations. This assertion is an abnegation of First Amendment precedent which must be condemned specifically by this Court. Such overt refusal to acknowledge, must less implement, this Court's protection of our basic constitutional liberties cannot be tolerated.

Inc. v. Sullivan, 372 U.S. 58 (1963); *New York Times Co. v. United States*, 403 U.S. 713 (1971). A time, place and manner ordinance, like most laws, is presumed valid, and one who challenges it bears the burden of demonstrating its invalidity. A prior restraint restricting political speech must include each procedural safeguard in *Freedman*. A time, place and manner restriction need not.

It is clear that if the courts are allowed to disregard this Court's requirement that a prior restraint analysis be applied to all statutes, ordinances, rules and regulations requiring a permit before citizens may be heard, restricting political speech, the burden on free speech will become intolerable and the First Amendment greatly diminished.[13]

II. THERE IS A CONFLICT AMONG THE CIRCUITS ON THE REQUIREMENTS OF *FREEDMAN V. MARYLAND*.

In *Freedman v. Maryland*, 380 U.S. 51 (1965) the Court established certain procedural safeguards that must accompany every prior restraint on free speech. *Freedman* was faithfully followed by the circuits until 1993, when the Seventh Circuit decided *Graff v. City of Chicago*, 9 F.3d

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13. As far as Petitioners can determine, no other circuit allows a time, place and manner analysis of an ordinance requiring a permit for core political speech in a public forum. The Seventh Circuit stands alone in its position.

1309 (7th Cir. 1993), *cert. denied*, 511 U.S. 1085 (1994). Since *Graff*, numerous conflicts have arisen among the circuits, and it is time for those conflicts to be resolved.

A. The Court must decide whether prompt judicial review requires a prompt judicial decision.

As many of the federal circuit courts have noted, and as this Court observed in *City News & Novelty, Inc. v. City of Waukesha*, 531 U.S. 278 (2001), there is a serious conflict among the circuits on an issue of significant constitutional importance: the requirement that a prior restraint of speech provide for prompt judicial review. The circuits are hopelessly divided as to whether "prompt judicial review" means merely prompt access to the courts, or prompt judicial disposition of the case. This case raises many of the same issues presented in *Thomas v. Chicago Park District*, Docket No. 00-1249, *pet. for cert. granted*, May 29, 2001.[14]

Significant conflicts exist, involving decisions of the First, Second, Fourth, Fifth, Sixth, Seventh, Ninth and Eleventh Circuits.[15] The First Circuit, in *Jews for Jesus, Inc.*

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14. Petitioners will not unnecessarily repeat the arguments made in the Petition in the Park District case.

15. There are also conflicts among district courts in circuits that have (continued...)

v. Mass. Bay Trans. Auth., 984 F.2d 1319 (1st Cir. 1993), held that prompt access to the courts after denial of a permit satisfies the prompt judicial review requirement of *Freedman*. The Fifth Circuit agreed, in *TK's Video, Inc. v. Denton County*, 24 F.3d 705 (5th Cir. 1994). On the other side of the issue, the Fourth Circuit, in *11126 Baltimore Blvd., Inc. v. Prince George's County*, 58 F.3d 988 (4th Cir. 1995), the Sixth Circuit, in *East Brook Books, Inc. v. City of Memphis*, 48 F.3d 220 (6th Cir. 1995), and the Ninth Circuit, in *Baby Tam & Co., Inc. v. City of Las Vegas*, 154 F.3d 1097 (9th Cir. 1998), all held that only a guarantee of a prompt judicial determination would satisfy *Freedman*. This Court must end the confusion, so that the right to engage in core political speech in a public forum is protected in every city and county in America. This issue has so divided the circuits that there is no consistent principle of law applicable to the fifty states. Citizens in some states have greater constitutional protection for their right to free speech (of all types) than citizens of other states. The circuit courts are divided; the district courts are divided; and the situation cries out for resolution by this Court.

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15. (...continued)
not ruled on this issue. *Compare, e.g., Books, Inc. v. Pottawattamie County*, 978 F. Supp. 1247 (S.D. Iowa 1997), a court in the Eighth Circuit holding that prompt judicial access is sufficient, with *Franken Equities, L.L.C. v. City of Evanston*, 967 F. Supp. 1233 (D. Wyoming 1997), a court in the Tenth Circuit holding that only a guarantee of a prompt judicial decision will satisfy *Freedman*.

B. The Court must also decide who bears the burden to seek judicial review, and the burden in the review proceeding.

In addition to the conflict over what constitutes prompt judicial review, other irreconcilable conflicts exist as to the correct application of *Freedman*. In this case, and in *Thomas v. Chicago Park District,* the Seventh Circuit held that the government need not initiate judicial review or bear the burden of proof if the permitting ordinance does not expressly authorize censorship. In *Cannabis Action Network, Inc. v. City of Gainesville*, 231 F.3d 761 (11th Cir. 2000) the Eleventh Circuit held just the opposite: that each of the *Freedman* procedural safeguards, including the government's burden to commence judicial review, applies to a content-neutral permit ordinance regulating political speech:

> In the case before us, the censored party lacks the business incentive to pursue review through the courts, and the speech at issue is core political speech in a public forum . . . The right to speak sought by CAN in this instance deserves greater protection than that outlined by the plurality in *FW/PBS*. Accordingly, we decline to relieve the City of the requirement that its Street Closing Ordinance meet *Freedman*'s first

procedural safeguard.

231 F.3d at 776.

This, then, constitutes another conflict to resolve, adding to the importance of granting this Petition for Certiorari.

III. IN HOLDING THAT THE CHICAGO PARADE PERMIT ORDINANCE DOES NOT CONTAIN UNFETTERED DISCRETION, THE SEVENTH CIRCUIT HAS DECIDED AN IMPORTANT FEDERAL QUESTION IN A WAY THAT DIRECTLY CONFLICTS WITH RELEVANT DECISIONS OF THIS COURT.

The Seventh Circuit panel made another critical decision in this case that must be reviewed by this Court. In concluding that the City's parade permit ordinance does not contain unfettered discretion and, therefore, is to be analyzed as a time, place and manner regulation (instead of the more stringent test applied to prior restraints), the panel declined to follow well-established precedent from this Court. The panel's decision places an intolerable burden on persons who want to engage in core political speech in a traditional public forum, and cannot be allowed to stand as the law.

The panel decided that the parade permit ordinance is not to be analyzed as a prior restraint, but as a time, place and manner restriction, because the ordinance "sufficiently articulates definitive standards on which the Commissioner must base his decision . . . ." App. at 20a; 243 F.3d at 1019. It reached that conclusion in spite of language in the ordinance that allows the City to deny virtually any permit.

The ordinance allows the Commissioner to make numerous determinations in deciding whether to issue a permit. He must first decide whether the proposed parade will "substantially or unnecessarily interfere with traffic in or contiguous to the activity, or that, if the activity will substantially interfere with such traffic, that there are available at the time of the proposed activity sufficient city resources to mitigate the disruption." There are no guidelines or standards to aid the Commissioner in deciding if the interference with traffic is either substantial or unnecessary. Presumably, reasonable persons could arrive at different conclusions. Nothing defines what areas are "contiguous" to the proposed route of the parade. And no standards exist to help determine what city resources are "sufficient" to mitigate the disruption.

The Commissioner is then authorized to decide if there are "a sufficient number of peace officers to police and protect lawful participants in the activity and non-participants from traffic related hazards in light of the other demands for police protection at the time of the

proposed event or activity."[16] This provision lacks any standards to limit the exercise of the Commissioner's discretion as to how many officers are "necessary" to meet "other demands for police protection."

Next, the Commissioner is allowed to decide if "the concentration of persons, animals, vehicles, or things at the assembly and disbanding areas and along the parade or athletic event route will not prevent proper fire and police protection or ambulance service." What is a "concentration," and what is "proper fire and police protection [and] ambulance service," are left to the Commissioner's discretion.

Finally, the Commissioner can decide if "the application contains sufficient information about the proposed route and crowd estimate to enable the commissioner to evaluate the proposed event under this section." What information would be "sufficient" to allow the Commissioner to "evaluate" the event is left to the Commissioner's discretion.

This Court has on numerous occasions condemned the inclusion of discretion in ordinances requiring a permit to engage in free speech: "Our cases make clear that a statute that requires such a 'license' for the dissemination

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16. As Judge Rovner pointed out in her dissent, this provision is so bereft of standards that it clearly allows for a "heckler's veto."

of ideas is inherently suspect." *Secretary of State of Maryland v. Joseph H. Munson Co.*, 467 U.S. 947, 964, n. 12 (1984)."[A] scheme that places 'unbridled discretion' in the hands of a government official or agency constitutes a prior restraint and may result in censorship.' " *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 225 (1990). When the government imposes a prior restraint on free speech, this Court has required "narrow, objective, and definite standards to guide the licensing authority." *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-151 (1969). In *City of Lakewood v. Plain Dealer Publ. Co.*, 486 U.S. 750 (1988) the Court explained the reasons for this requirement:

> [T]he absence of express standards makes it difficult to distinguish, "as applied," between a licensor's legitimate denial of a permit and its illegitimate abuse of censorial power. Standards provide the guideposts that check the licensor and allow courts quickly and easily to determine whether the licensor is discriminating against disfavored speech. Without these guideposts, *post hoc* rationalizations by the licensing official and the use of shifting or illegitimate criteria are far too easy, making it difficult for courts to determine in any particular case whether the licensor is permitting

> favorable, and suppressing unfavorable, expression . . . .
>
> 486 U.S. at 758.

In *Forsyth County v. Nationalist Movement*, 505 U.S. 123 (1992) the Court provided guidance to the lower courts on how they are to decide when a restriction contains excess discretion:

> If the permit scheme "involves appraisal of facts, the exercise of judgment, and the formation of an opinion," *Cantwell v. Connecticut*, 310 U.S. 296, 305 (1940), by the licensing authority, "the danger of censorship and of abridgment of our precious First Amendment freedoms is too great" to be permitted, *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 553 (1975).
>
> 505 U.S. at 131.

With these opinions to guide it, the Seventh Circuit panel examined the ordinance, and said:

> While Chicago's ordinance provides some flexibility, it limits the Commissioner's discretion by requiring the Commissioner to grant a parade

> permit, unless specifically articulated public-safety concerns exist.
>
> App. at 18a; 243 F.2d at 1028.

The "flexibility" noted by the panel allows the Commissioner to engage in an "appraisal of facts, the exercise of judgment, and the formation of an opinion."[17] He can decide that a huge parade to honor the Chicago Bulls for winning an NBA championship does not cause any particular problems for police, fire and ambulance protection, but that a tiny little parade to generate support for the movement to legalize marijuana constitutes a threat to the peace and safety of the City.[18]

> It is settled by a long line of recent decisions of this Court that an ordinance which . . . makes the peaceful enjoyment of freedoms which the Constitution guarantees contingent

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17. But as Judge Rovner observed in dissent: "The Chicago parade ordinance allows not only the appraisal of facts and exercise of judgment warned against in *Forsyth County* and other cases, but also grants City officials free reign to consider the effect of counter-demonstrations on its ability to protect against traffic hazards." App. at 50a; 243 F.3d at 1041.

18. This, of course, is exactly what has routinely happened. No parade application submitted by these Petitioners was ever granted without a fight.

> upon the uncontrolled will of an official – as by requiring a permit or license which may be granted or withheld in the discretion of such official – is an unconstitutional censorship or prior restraint upon the enjoyment of those freedoms.' " *Shuttlesworth, supra*, 394 U.S., at 151 (*quoting Staub, supra*, 355 U.S., at 322).
>
> *FW/PBS*, 493 U.S. at 225-26.

The panel opinion is in stark contrast to this Court's requirements for clear, objective standards necessary to authorize a prior restraint on the right to free speech. This Ordinance is simply a longer version of the parade ordinance condemned in *Shuttlesworth*. This Court must grant review to correct the Seventh Circuit's misreading of numerous decisions of this Court on this point.

CONCLUSION

> Swift judicial review is the remedy needed by those held back from speaking.
>
> *City News*, 121 S.Ct. at 748.

Two centuries ago the people of this nation were galvanized into a fight for independence through public protest, often in the streets. That tradition has served us well throughout the life of the Republic. Jim Crow met his death because of protest in the streets. The disastrous war in Viet Nam was brought to an end because of protests in the streets.

The City of Chicago is no stranger to government efforts to suppress speech. The Seventh Circuit has gone so far as to declare that Chicago reigns "as the censorship capital of the United States." *Nelson v. Streeter,* 16 F.3d 145, 147 (7th Cir. 1994). The vision of police assaults on demonstrators during the 1968 Democratic National Convention is seared in our collective memory.

Petitioners cannot state their case in strong enough terms. Core political speech is in serious danger. Governmental bureaucrats are now, for all practical purposes, the final arbiters of who will speak on the public streets and who will not, since prompt judicial review of

the denial of a permit is no longer guaranteed. Unless this Court acts, speakers with views disfavored by the government will be silenced, and only those with a viewpoint winning government approval will be able to parade through the thoroughfares of our towns and cities in support of their political beliefs.

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APPENDICES

United States Court of Appeals,
Seventh Circuit.

Robert MacDONALD, Caren C. Thomas and Windy City Hemp Development Board,
Plaintiffs-Appellees, Cross-Appellants,

v.

CITY OF CHICAGO, Defendant-Appellant, Cross-Appellee.

Nos. 98-3836, 98-3912, 99-1429.

Argued Jan. 20, 2000.
Decided March 12, 2001.

Individual and group advocating legalization of marijuana sued city, challenging constitutionality of parade ordinance. The United States District Court for the Northern District of Illinois, David H. Coar, J., 1998 WL 673652, enjoined enforcement and appeal was taken. The Circuit Court, Manion, Circuit Judge, held that: (1) Court of Appeals would review current version of ordinance, rather than version in effect at time suit was commenced; (2) ordinance did not impermissibly confer unfettered discretion on police commissioner in determining whether to grant permit; (3) ordinance would be analyzed as time, place and manner restriction on protected speech, rather than prior restraint; (4) requirement that need for police be taken into consideration did not impermissibly mandate that

content of speech be taken into consideration; (5) ordinance was valid time, place and manner restriction on protected speech; (6) in any event, ordinance satisfied expeditious judicial review requirement for valid prior restraint; and (7) prior restraint requirement that government assume burden of seeking judicial enforcement of permit denial was inapplicable.

Reversed.

Ilana Diamond Rovner, Circuit Judge, concurred in part and dissented in part, and filed opinion.

West Headnotes

Constitutional Law ⇦ 47
92k47 Most Cited Cases

Court of Appeals would not review constitutionality of ordinance governing city's grant of parade permits, in effect at time that applicant filed suit after being denied permit; it was ordinance as amended following institution of action that was at issue.

Constitutional Law ⇦ 90.1(4)
92k90.1(4)

Municipal Corporations ⇦ 703(2)
268k703(2)

City ordinance governing grant of parade permit was valid time, place, and manner limitation on

constitutionally protected speech, despite claim that it left police commissioner with unfettered discretion in determining whether to grant permit; to deny permit, Commissioner was required to find substantial interference with traffic, insufficient availability of police, and congestion sufficient to interfere with fire, police, and ambulance service. U.S.C.A. Const. Amend. 1.

Constitutional Law ⇦ 90.1(4)
9290.1(4)

City ordinance governing grant of parade permit, challenged on First Amendment grounds, would be analyzed as time, place and manner restriction on protected speech, rather than as prior restraint, as it imposed objective standards on grant or denial or permit and required city to provide alternate means of expression. U.S.C.A. Const. Amend. 1.

Constitutional Law ⇦ 90.1(4)
92k90.1(4)

Municipal Corporations ⇦ 703(2)
268k703(2)

Provision of city ordinance governing grant of parade permit, allowing police commissioner to take into account availability of police to handle anticipated traffic situation, was not content-based restriction on speech barred by First Amendment, despite claim that commissioner could consider purpose of parade when determining what constituted adequate police protection. U.S.C.A. Const. Amend. 1.

Constitutional Law ⇐ 90.1(4)
92k90.1(4) Most Cited Cases
Permits.

Municipal Corporations ⇐ 703(2)
268k703(2)

City ordinance governing grant of parade permit was valid time, place, and manner restriction on protected speech; grant of permit was not based on assessment of content, as police commissioner was limited to considering traffic control and safety factors in making decision, ordinance was narrowly tailored to achieve valid governmental traffic and safety concerns by requiring individual assessments of each situation, and ordinance left open avenues for alternate expression by mandating that commissioner grant alternate permit allowing parade under circumstances as close as possible to time, place and manner of proposed parade. U.S.C.A. Const. Amend. 1.

Constitutional Law ⇐ 90.1(4)
92k90.1(4)

Municipal Corporations ⇐ 703(2)
268k703(2)

Provision of city ordinance governing parade permits, specifying that adverse decisions of police commissioner were "subject to judicial review in accordance with applicable law," satisfied requirement, for prior restraint on speech under First Amendment, that expeditious review be available, even though ordinance lacked any

express assurance of prompt judicial review. U.S.C.A. Const. Amend. 1.

Constitutional Law ⇐ 90.1(4)
92k90.1(4)

City was not required to bear burden of going to court in order to enforce denial of parade permit, made pursuant to ordinance regulating parades, or bear burden of proof once in court, as required in order to sustain prior restraint of protected speech; grant of permit under ordinance in question turned on questions of traffic and safety, rather than censorship of content. U.S.C.A. Const. Amend. 1.

*1023 Wayne B. Giampietro, Witwer, Poltrock & Giampietro, Chicago, IL, Richard L. Wilson (argued), Orlando, FL, for plaintiff-appellee.

Lawrence Rosenthal (argued), Benna R. Solomon, Office of the Corporation Counsel, Chicago, IL, for defendant-appellant.

Before COFFEY, MANION, and ROVNER, Circuit Judges.

MANION, Circuit Judge.

Robert MacDonald sued the City of Chicago seeking a declaration that the city's ordinance permitting parades violates the First Amendment, and a permanent injunction barring its enforcement. The district court

concluded that although the ordinance did not provide the City with unlawful discretion to deny permits, it was unconstitutional because it lacked the procedural safeguards set forth in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Accordingly, the district court enjoined enforcement of the ordinance. The City of Chicago appealed. MacDonald filed a cross-appeal, challenging the district court's conclusion that the ordinance did not grant the City unconstitutional discretion.

While the appeal was pending, the City of Chicago amended the ordinance, and then it filed a Rule 60(b)(5) motion in the district court asking the court to vacate its injunction. The district court denied the motion to vacate, concluding that the amendments to the ordinance did not cure the constitutional defects. The City of Chicago appealed from that decision, and we consolidated both appeals. We also granted Caren Cronk Thomas and the Windy City Hemp Development Board leave to substitute as plaintiff-appellees/cross-appellants in the place of Robert MacDonald, who had since died. We now conclude that the ordinance does not provide the City with unconstitutional discretion to review parade-permit applications. We further conclude that the ordinance is a valid time, place, and manner restriction, and that the ordinance's challenged procedural safeguards are constitutional. Therefore, we REVERSE the district court's declaration that the ordinance is an unconstitutional prior restraint of speech.

For simplicity's sake, we will continue to refer to

MacDonald and "his" arguments on appeal.

I. Background

Robert MacDonald was a vocal advocate for the legalization of marijuana. In order to spread his message, MacDonald organized various events, including marches and political rallies. In June 1997, MacDonald applied for a parade permit pursuant to Chicago Ordinance 10-8-330(b), which requires anyone who plans to conduct a parade on any public street or sidewalk to obtain a permit from the Commissioner of the Chicago Department of Transportation ("Commissioner"). In his application, MacDonald requested a permit to hold a march on August 23, 1997 in downtown Chicago, marching through the "Loop, " up Michigan Avenue to Chicago Avenue, returning south along Michigan Avenue to the Loop. The parade was to be held in conjunction with a political rally in Grant Park, which was the subject of another lawsuit. MacDonald v. Chicago Park Dist., 132 F.3d 355 (7th Cir.1997) (denying MacDonald's request for a preliminary injunction preventing the park district from denying requests for park permits).

> The "Loop" is a portion of the central Chicago business district, which gets its name from the elevated trains that "loop" around it.

*1024 The Commissioner denied MacDonald's

application for a parade permit, concluding that:

> The proposed activity will substantially and unnecessarily interfere with traffic; there are not available a sufficient number of peace officers to police and protect participants; and the concentration of things at the assembly and along the route will prevent proper fire and police protection and ambulance service.

The Commissioner's cited justifications derive from other portions of Chicago's ordinance, particularly subsection (h), which requires the Commissioner to issue a parade permit when he finds that:

The proposed activity will not substantially or unnecessarily interfere with traffic in the area contiguous to the route;

There are available at the time of the parade, public assembly or athletic event a sufficient number of peace officers to police and protect lawful participants in the activity;

The concentration of persons, animals, vehicles, or things at the assembly and disbanding areas and along the parade or athletic event route will not prevent proper fire and police protection or ambulance service;

Chicago Ordinance, § 10-8-330(h).

After the Commissioner denied MacDonald's parade-permit application, MacDonald filed a verified complaint seeking declaratory and injunctive relief against the City of Chicago; his complaint, brought pursuant to 28 U.S.C. § 1983, alleged a facial challenge to portions of the City's parade permitting ordinance, claiming violations of the First Amendment. After full briefing on MacDonald's

motion for a preliminary injunction, the parties reached an agreement allowing MacDonald to conduct a more limited parade than the one he originally sought. The district court then denied the motion for a preliminary injunction as moot.

But the dispute did not end there. On January 8, 1998, MacDonald applied for a parade permit to conduct a parade on May 9, 1998 at 11:00 a.m. following a route virtually identical to the one he had applied for in August 1997. The Commissioner denied this application for the same reasons he denied MacDonald's first application, but the Commissioner also suggested an alternative parade route. MacDonald apparently was not satisfied with the proposed alternate route, and he again requested a preliminary injunction. The parties, however, once more settled their differences, and MacDonald withdrew his request for preliminary relief.

The district court then considered the parties' cross-motions for summary judgment on the merits of MacDonald's First Amendment claim for declaratory and permanent injunctive relief. The district court concluded that Chicago Ordinance 10-8-330 violated the First Amendment because, even though it did not confer upon the Commissioner unfettered discretion, it required the Commissioner to consider whether a sufficient number of police officers would be available to protect the participants, and this, the court believed, required the Commissioner to consider the content of the marchers' speech. Accordingly, the district court concluded that the ordinance was an unconstitutional content-based regulation of speech. The district court further held that

the ordinance constituted a prior restraint, and as such must include the three constitutional safeguards set forth by the Supreme Court in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), the third of which required the censor to bear the burden of going to court to suppress the speech and to bear the burden of proof once in court. The district court concluded that because the Commissioner did not bear those burdens, Chicago Ordinance 10-8-330 constituted an unconstitutional prior restraint. The district court then permanently enjoined enforcement of Section 10-8-330.

The City of Chicago appealed from the district court's decision, and MacDonald cross-appealed from the district court's *1025 conclusion that Section 10-8-330 did not provide the City of Chicago with unconstitutional discretion. After filing its notice of appeal, the City of Chicago also amended its ordinance, and then requested the district court to vacate its injunction pursuant to Rule 60(b)(5). The district court concluded that the amendments to the ordinance did not alter the result. The City of Chicago appealed from that decision, and we consolidated both appeals. We also granted Caren Cronk Thomas and the Windy City Hemp Development Board leave to substitute as plaintiff-appellees/cross-appellants because MacDonald had since died. *See supra* at 1023.

II. Analysis

We review de novo decisions on summary judgment as we do questions of constitutional law. Stokes v. City of Madison, 930 F.2d 1163, 1168 (7th Cir.1991) ("All First Amendment issues, save the district court's acceptance of

stipulated facts, we review de novo."). However, before considering the constitutionality of Chicago Ordinance 10-8-330, we must initially consider which version of the ordinance is properly before us: MacDonald argues that we should consider the constitutionality of both the ordinance in effect at the time he filed suit and the current version; whereas the City contends that any dispute over the original ordinance has been mooted by its subsequent modifications, and thus we should consider only the constitutionality of the modified ordinance.

> A red-lined version of the entire ordinance, showing the current amendments to the earlier version, appears in Appendix A.

We agree with the City that the new ordinance is the only one before us on review. Any dispute over the 1997 version of the ordinance was mooted by the enactment of the new ordinance. Kremens v. Bartley, 431 U.S. 119, 129, 97 S.Ct. 1709, 52 L.Ed.2d 184 (1977) ("[T]he enactment of the new statute clearly moots the claims of the named appellees."). But even as revised, the ordinance as interpreted by the district court continues to impact the plaintiffs. Thus, since a case or controversy remains, we will consider the constitutionality of Chicago's parade permitting ordinance as it now stands. Fusari v. Steinberg, 419 U.S. 379, 387, 95 S.Ct. 533, 42 L.Ed.2d 521 (1975) (holding that in considering the constitutionality of the challenged law, "[t]his Court must review the District Court's judgment in light of

presently existing Connecticut law, not the law in effect at the time that judgment was rendered."). *See, e.g.*, 11126 Baltimore Blvd., Inc. v. Prince George's County, Md., 58 F.3d 988, 991-92 (4th Cir.1995) (reviewing only the constitutionality of the current version of the zoning ordinance, notwithstanding County's assertion that it intended to return to its prior ordinance if the court upheld the constitutionality of the previous version).

According to MacDonald, as it now stands, Chicago's parade permitting ordinance still violates his First Amendment rights. Without question, MacDonald's parade and rally in support of the use and legalization of marijuana is speech protected by the First Amendment of the United States Constitution. Although he has the right to demonstrate and speak freely on this issue, that right does not allow him and other participants to create chaos by disrupting traffic, impeding pedestrians, endangering themselves or other people, and otherwise causing gridlock on the busy streets and sidewalks of the city of Chicago. At the same time, the City has an obligation not only to permit MacDonald and other participants to engage in the parade and rally, but it is also obliged to protect the participants, to ensure their safety and that of others in the area, to maintain an orderly flow of traffic, and to prevent disruptive or even violent confrontations. To meet this obligation, the City must have sufficient police officers available to see to it that the parade proceeds in an orderly fashion along a pre-designated *1026 route in order to allow the demonstrators to exercise their speech rights while the City continues to function and non-participants go about their normal business.

But balancing these rights and obligations is no simple task. The courts have been embroiled in First Amendment challenges for decades. The resulting case law is complicated to say the least. The Supreme Court has issued a number of split decisions and various circuits have taken divergent paths in resolving the conflicts between the free speech rights of individuals and the obligation of government officials to maintain order and even-handed protection among its citizens. In the continuing examination, we are now faced with yet another challenge in which we must apply the present facts to the constitutional law as it now stands. To do so, we must consider the specific constitutional challenges presented by MacDonald, and the City's response.

MacDonald first argues that Section 10-8-330 unconstitutionally vests the Commissioner with unfettered discretion to grant or deny a parade permit. Second, MacDonald asserts that the ordinance is a prior restraint on speech and therefore must guarantee prompt judicial review, which it does not. Finally, MacDonald argues that as a prior restraint, the ordinance must also place the burden to seek judicial review of any permit denial on the City, but it does not. Conversely, the City of Chicago argues that its parade-permitting ordinance does not confer on the Commissioner unlimited discretion, and that it is not a prior restraint of speech, but rather a valid time, place, and manner restriction.

A. Unfettered Discretion?

It is well established that where a statute or ordinance vests the government with virtually unlimited authority

to grant or deny a permit, that law violates the First Amendment's guarantee of free speech. *See* Saia v. People of State of New York, 334 U.S. 558, 559-60, 68 S.Ct. 1148, 92 L.Ed. 1574 (1948) (city ordinance prohibiting use of sound amplification devices, except with permission obtained from chief of police, is invalid as infringing right of free speech, in absence of any standards prescribed for exercise by chief of police of his discretion); City of Lakewood v. Plain Dealer Pub. Co., 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988) (licensing scheme which gives the government unlimited discretion is facially unconstitutional). As we have reiterated, where virtually unlimited discretion exists, "the possibility is too great that it will be exercised in order to suppress disfavored speech." MacDonald v. Chicago Park Dist., 132 F.3d 355, 361 n. 6 (7th Cir.1997) (citing Lakewood, 486 U.S. at 757-58, 108 S.Ct. 2138).

MacDonald argues that Chicago Ordinance 10-8-330(h) confers on the Commissioner unfettered discretion to approve or deny parade-permit applications, and thus it violates the First Amendment. For instance, MacDonald points to the ordinance's requirements that the Commissioner consider whether the proposed parade will "substantially or unnecessarily interfere with traffic in the area contiguous to the route," whether there are available "sufficient city resources to mitigate the disruption," whether there are available "a sufficient number of peace officers to police and protect lawful participants and non-participants from traffic related hazards in light of the other demands for police protection," and whether the concentration of persons

will "prevent proper fire and police protection or ambulance service." He then queries the court, "What are 'substantially,' 'unnecessarily' and 'sufficient'?" He argues that this loose language leaves the Commissioner with complete discretionary authority to grant or deny a parade permit, and therefore the ordinance is unconstitutional.

In support of his position, MacDonald cites several Supreme Court cases, such as Shuttlesworth v. City of Birmingham, Ala., 394 U.S. 147, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969). In Shuttlesworth the *1027 Court considered the constitutionality of a Birmingham ordinance that required the city commission to issue a parade permit unless in "its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience required that it be refused." Id. at 149-50, 89 S.Ct. 935. The Court struck the ordinance because it unconstitutionally conferred the government with unbridled discretion. Similarly in Schneider v. State of New Jersey, Town of Irvington, 308 U.S. 147, 60 S.Ct. 146, 84 L.Ed. 155 (1939), the Court struck down a municipal ordinance which allowed the Chief of Police to deny a permit to door-to-door solicitors if he determined the speaker was "not of good character." In Staub v. City of Baxley, 355 U.S. 313, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958), the Court likewise invalidated a city ordinance because of the unfettered discretion granted the decisionmaker. Id. at 321, 78 S.Ct. 277. In that case the mayor could deny permits to applicants requesting permission to solicit others to join their organization based on the "character of the applicant, the nature of the business of the organization for which members are

desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley." Id.

But as the district court correctly noted, "[i]n contrast to the obscure standards in the cases cited above, the provisions of § 10-8-330(h)(1)-(4) specify legitimate safety concerns in as precise a manner as such concerns can reasonably be articulated." D.Ct. Opn. at 13. Moreover, as the district court further reasoned, in terms of the type of "discretion" that it confers, § 10-8- 330 is more analogous to other ordinances that have been upheld in this circuit. Specifically, in Graff v. City of Chicago, 9 F.3d 1309 (7th Cir.1993), this court considered en banc whether a Chicago ordinance which contained six criteria for determining whether to grant a license application for a newsstand unconstitutionally conferred unlimited discretion on the designated city officials. Among the six criteria, city officials were required to consider "[w]hether the design, materials and color scheme of the newspaper stand comport with and enhance the quality and character of the streetscape, including nearby development and existing land uses" and "the extent to which services that would be offered by the newspaper stand are already available in the area." Id. at 1317-18 (quoting Chicago Mun.Code § 1028-160(a)). The ordinance further empowered city officials to "remove a newsstand that 'endangers public safety or property,' " that "interferes with or impedes the flow of pedestrian or vehicular traffic," or that is placed "in such a manner as to impede or interfere with the reasonable use of [a display window.]" Id. at 1319 (quoting Chicago Mun.Code § 10-28158(a) & (b)).

Notwithstanding the flexibility in the above quoted criteria, a majority of the Graff court concluded that the ordinance did not provide the decisionmaker with such unfettered discretion that it offended the First Amendment. Id. at 1317-18; id. at 1329 (Flaum, J., concurring) (noting that while the enumerated factors allow flexibility, they are "the kinds of legitimate concerns one would expect a city to weigh when deciding how to allocate limited public space in a neutral way."); id. at 1335 (Ripple, J., concurring) ("In no way does the ordinance place unfettered discretion in the hands of city officials."). In fact, this court recently made this same point in another case involving MacDonald: "nine of twelve judges on the en banc court [in *Graff*] concluded that [that] ordinance was sufficiently objective and specific to limit the decisionmaker's discretion and thereby to survive a facial First Amendment challenge." MacDonald v. Chicago Park Dist., 132 F.3d 355, 361 (7th Cir.1997) (citing Graff, 9 F.3d at 1318, 1329, 1335).

Section 10-8-330 more closely resembles the ordinance at issue in Graff than those rejected in Schneider, Staub, and Shuttlesworth. Like the Graff ordinance, Section 10-8-330 specifically and narrowly identifies the reasonable and necessary governmental concerns--traffic flows, traffic hazards, and emergency transportation. *1028 Moreover, to the extent that Section 10-8-330 provides flexibility for the Commissioner's evaluation of those concerns with the use of such words as "substantially," "unnecessarily," and "sufficient," this actually provides an additional limitation on the government's discretion, as compared to that contained in the ordinance in Graff;

there, the ordinance allowed City officials to remove a newsstand if it "endangers public safety or property," or "interferes with or impedes the flow of pedestrian or vehicular traffic," but the ordinance did not provide officials with any threshold of harm. Yet, a majority of this court found the ordinance in Graff sufficiently precise so as to conclude that it did not provide the City with unconstitutionally unfettered discretion. Graff, 9 F.3d at 1317-18; id. at 1329 (Flaum, J., concurring); id. at 1335 (Ripple, J., concurring). *See also,* Ward v. Rock Against Racism, 491 U.S. 781, 794, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989) ("While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required even of regulations that restrict expressive activity."); United States v. Kistner, 68 F.3d 218, 221 (8th Cir.1995) (park permit regulation that required consideration of "peace and tranquility," public health and safety, and potential for damage to park resources and facilities, did not unconstitutionally vest government with unbridled discretion).

Similarly, while Chicago's ordinance provides some flexibility, it limits the Commissioner's discretion by requiring the Commissioner to grant a parade permit, unless specifically articulated public-safety concerns exist. And the public-safety concerns contained in the Ordinance closely resemble the type of factors approved of in Graff. For instance, in Graff city officials had discretion to consider whether the newsstand "interfere[d] with or impede[d] the flow of pedestrian or vehicular traffic," while here the Commissioner considers

whether the parade "unnecessarily interfere[s] with traffic in the area contiguous to the route." While the other factors set forth in Section 10-8-330 differ in type from those approved of in Graff, they are of the same nature, and similarly limit the Commissioner's discretion.

More recently, this court considered the constitutionality of a closely analogous Chicago ordinance--one covering park permits. In Thomas v. Chicago Park Dist., 227 F.3d 921 (7th Cir.2000), the same plaintiffs as involved in this case presented a facial challenge to the City of Chicago's regulations which govern the use of parks, and which require a permit for an assembly, parade, demonstration, sporting event, or other use of the park by a group of 50 or more persons. Chi. Park Dist.Code ch. VII. In that case, the plaintiffs claimed, among other things, that the ordinance provided the City with unconstitutional discretion. In support of their position, the plaintiffs cited various sections of the ordinance, including a provision allowing the City to deny a permit if the applicant "has on prior occasions made material misrepresentations regarding the nature or scope of any event or activity previously permitted." The plaintiffs also pointed to a provision that provided that "the park district 'may' deny a permit because of a misrepresentation, the failure to tender the fee, having damaged property of the park district on a previous occasion, or other grounds listed in the regulation,...." Notwithstanding the flexibility of words such as "material" and "misrepresentations," and the discretion provided the park district with the word "may," this court rejected the plaintiffs' contention that these provisions unconstitutionally vested the City of Chicago with too

much discretion. In doing so, this court noted that words such as "material" actually restricted the limitation on the City's discretion. Thomas also observed the difficulty in defining more specifically the factors to be considered given the various competing interests at play. Id. at 925 ("The plaintiffs complain that this is vague, but do not indicate how it could be made less vague yet encompass the myriad activities that *1029 the First Amendment has been held to protect.").

The ordinance at issue in this case closely resembles the park-permit ordinance upheld in Thomas. While both ordinances included language providing city officials with flexibility in assessing the proposed activity, the flexibility is no more than is necessary so as to allow the city officials to balance the competing interests at issue. Therefore, based on Graff, and more recently Thomas, we conclude that Section 10-8-330 sufficiently articulates definitive standards on which the Commissioner must base his decision concerning a parade application to withstand constitutional scrutiny.

B. Prior Restraint or Time, Place and Manner Restriction?

MacDonald next argues that Section 10-8-330 constitutes a prior restraint on speech and thus must provide certain procedural protections, which according to MacDonald, it does not. On the other hand, the City of Chicago argues that Section 10-8-330 merely regulates the time, place and manner of speech, and as such is not a prior restraint on speech.

Both parties find support in Supreme Court decisions. The City of Chicago cites Cox v. State of New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941), wherein the Court considered the constitutionality of a law requiring the issuance of a permit before marchers could occupy public ways. As the City correctly notes, the Court in Cox did not characterize that law as a "prior restraint," but rather upheld the law as a reasonable regulation of the "time, place, and manner in relation to the other proper uses of streets." Id. at 576, 61 S.Ct. 762. *See also* Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984). But MacDonald counters with FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), Forsyth County v. Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992), and City of Lakewood v. Plain Dealer Publishing Co., 486 U.S. 750, 108 S.Ct. 2138, 100 L.Ed.2d 771 (1988), wherein the Supreme Court analyzed licensing and permit regulations as "prior restraints," rather than as time, place and manner regulations.

The lead opinion in Graff (an en banc case with a five-judge plurality, with two concurrences involving four judges, and a dissent involving three judges) did not find it necessary to reconcile these seemingly contradictory precedents. Although the five-judge Graff plurality concluded that the regulation of a newsstand did not implicate the First Amendment, in the alternative, it concluded that even if it did, it was a constitutionally appropriate time, place and manner restriction, and the procedural safeguards provided were sufficient.

In his concurrence in Graff, which two other judges joined, Judge Ripple aptly synthesized the competing precedents. Accordingly, it is appropriate to incorporate that thorough analysis here in this case which indisputably implicates the First Amendment. *Compare,* Graff, 9 F.3d at 1313 ("Graff has no First Amendment right to build a structure on public property.").

As Judge Ripple explained:

> For a very long time the Supreme Court has had to deal with even-handed attempts to regulate the exercise of expression in public forums. Parade or demonstration permits are the usual context in which these cases have arisen. The Court has evaluated such attempts by governments to bring order to the public forum under what is commonly known as time, place, or manner analysis. See Clark v. Community for Creative Non-Violence, 468 U.S. 288, 104 S.Ct. 3065, 82 L.Ed.2d 221 (1984) .... see also Cox v. New Hampshire, 312 U.S. 569, 576, 61 S.Ct. 762, 85 L.Ed. 1049 (1941).

Id. at 1334.

> But, as Judge Ripple further explained, FW/PBS and Lakewood
> *1030 appl[ied] prior restraint analysis to fact situations that are the functional equivalent of those situations that the Court had analyzed traditionally under the time, place, and manner analysis. Specifically, in Lakewood, the Court struck down as facially invalid an ordinance requiring a license to place newspaper dispensing machines on the city streets. Similarly, in FW/PBS, the Court struck down parts of an ordinance requiring the licensing of adult businesses. In both cases, the Court characterized the

> restriction imposed by the ordinance as a prior restraint and determined that its failure to comply with the stringent mandate of Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), rendered the ordinance unconstitutional.
>
> Id.

Why then did the Court not "follow its usual approach of treating factual situations such as these as susceptible to time, place, and manner analysis and instead employ[ed] prior restraint analysis"? Id. As reasoned in Judge Ripple's concurrence,

> [w]hat distinguishes the Court's treatment of licensing schemes in these two sets of cases is the presence of unfettered discretion. In both Cox and Clark, the Court dealt with the administration of an ordinance or regulation which proscribed the activity of the licensing authority. In fact, the Cox Court distinguished those cases in which government officials were unrestrained in their power to grant or deny permits. 312 U.S. at 577, 61 S.Ct. 762. In both Lakewood and FW/PBS, however, there was unfettered discretion to grant or deny the license in Lakewood pursuant to the very language of the ordinance and in FW/PBS pursuant to the way the licensing official could delay the licensing decision, presumably indefinitely. This type of discretion, in the Court's eyes, "gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." Lakewood, 486 U.S. at 759, 108 S.Ct. 2138. It also presents the possibility of self-censorship. Id. Because of these concerns, the Court in Lakewood struck down

> the ordinance absent "neutral criteria to insure that the licensing decision is not based on the content," id. at 760, 108 S.Ct. 2138, and, in FW/PBS, struck down the ordinance absent the procedural guarantees of FW/PBS, 493 U.S. at 228, 110 S.Ct. 596.
> Id. at 1335.

Judge Ripple and the two judges joining his concurrence found that the concerns the Court voiced in both Lakewood and FW/PBS were not present in Graff because the ordinance in no way placed unfettered discretion in the hands of city officials. They therefore concluded that the ordinance should be analyzed according to the time, place, and manner guidelines of Cox, Clark, and City of Renton v. Playtime Theatres, Inc., 475 U.S. 41, 106 S.Ct. 925, 89 L.Ed.2d 29 (1986).

> In recognition of the continuing discussion and debate in the courts and in the legal community at large, Judge Ripple's concurrence noted that "there is a great need for clarification of standards in this area, and I respectfully suggest that this case is deserving of further review in the Supreme Court of the United States." Id. at 1335. Although the Court did not review Graff, the Court's decisions since then have also not resolved the conflicting analyses.

The Supreme Court's recent decision in Hill v. Colorado, 530 U.S. 703, 120 S.Ct. 2480, 147 L.Ed.2d 597 (2000), has added to the discussion of the distinction between

prior restraints and time, place and manner restrictions, but it has not resolved the issue. *See* Hill, 120 S.Ct. at 2491 (holding that Colorado statutory provision making it unlawful for any person to knowingly approach within 8 feet of another without that person's consent, to pass out information or engage in oral protest, education, or counseling, was not a prior restraint, *1031 but restricts the "place" of such communication). Also adding to the uncertainty is the fact that other circuits which have considered the constitutionality of parade-permit and licensing statutes following FW/PBS have treated such regulations as prior restraints of speech, subject to the procedural safeguards required of prior restraints. MacDonald v. Safir, 206 F.3d 183, 194 (2d Cir.2000) (New York's parade- permitting ordinance is a prior restraint on speech because one must get a permit from the Commissioner before staging a parade in New York); Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 889, 891 n. 6 (6th Cir.2000) (city's licensing scheme of adult business is a prior restraint of speech); Baby Tam & Co., Inc. v. City of Las Vegas, 154 F.3d 1097, 1100 (9th Cir.1998) ("Because [the Las Vegas ordinance] requires all proposed [adult] bookstores to apply for and obtain a license before engaging in business, the City's licensing scheme is properly analyzed as a prior restraint."); American Target Advertising, Inc. v. Giani, 199 F.3d 1241, 1250 (10th Cir.2000); cf. Boss Capital, Inc. v. City of Casselberry, 187 F.3d 1251, 1255 (11th Cir.1999) (applying Freedman factors to licensing ordinance, without classifying it as a prior restraint). And some circuits have considered permit and licensing ordinances as *both* time, place and manner restrictions *and* as prior restraints, applying both constitutional

standards to the challenged ordinance. *See, e.g.,* 11126 Baltimore Blvd., Inc., 58 F.3d at 995-96 (noting that otherwise valid time, place and manner regulation must be analyzed as prior restraint if ordinance requires a license to open adult bookstore); TK's Video, Inc. v. Denton County, Texas, 24 F.3d 705, 707 (5th Cir.1994); Beal v. Stern, 184 F.3d 117, 123-24 (2d Cir.1999).

This court recently resolved this uncertainty in Thomas. As noted above, Thomas considered the constitutionality of Chicago's park-permit ordinance. While the plaintiffs in Thomas had argued that the park-permit ordinance constituted an unconstitutional prior restraint, this court rejected a prior restraint formula stating:

> We do not find this [prior restraint formula] a helpful formula. The historical referent of "prior restraints" is censorship, see 4 William Blackstone, *Commentaries on the Laws of England* 151-53 (1769), which the administration of a park system does not much resemble. The statement in the plaintiffs' brief that "denial of a permit to hold a rally is the ultimate censorship" is hollow rhetoric. It is a censor's business to make a judgment about the propriety of the content or message of the proposed expressive activity. Because he is in the business of suppressing such activity (friends of free speech are not drawn to a career in censorship), the danger of abuse is very great, especially when assessed in light of the dismal history of censorship.
>
> The regulation challenged here does not authorize any judgment about the content of any speeches or other expressive activity--their dangerousness, offensiveness, immorality, and so forth. It is not even clear that the

regulation reduces the amount of speech. A park is a limited space, and to allow unregulated access to all comers could easily reduce rather than enlarge the park's utility as a forum for speech. *See* Cox v. New Hampshire, 312 U.S. 569, 574-76, 61 S.Ct. 762, 85 L.Ed. 1049 (1941); cf. Beal v. Stern, 184 F.3d 117, 128-29 (2d Cir.1999). Just imagine two rallies held at the same time in the same park area using public-address systems that drowned out each other's speakers. Cf. Ward v. Rock Against Racism, 491 U.S. 781, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). The heterogeneity of the practices that the "prior restraints" formula covers (with the present case compare Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965), involving a movie censorship board) is reason to doubt that it can provide much assistance to judges who have to decide a novel case. Thomas, 227 F.3d at 923-24. Because the park-permit ordinance at issue in Thomas *1032 did not concern itself with the content of the proposed speech, this court treated the ordinance as a time, place and manner licensing system. Id. at 926.

Thomas controls the case at hand, and we accordingly conclude that the appropriate approach is the time, place and manner analysis set forth by the Supreme Court in Cox and Clark. Here, as in Cox, Clark and Thomas, we have a permit scheme which limits the discretion of the government based on content-neutral criteria, and therefore the threat of censorship characteristic of a prior restraint is remote. Moreover, the ordinance at issue here presents an even more compelling case for a time, place and manner analysis than that at issue in Graff

because Section 10-8-330 does not, in advance of the planned parade or thereafter, prohibit anyone from marching. Rather, the ordinance *requires* the Commissioner to issue an alternative permit whenever he denies the permit application as requested, and the alternative permit *must* "to the extent practicable authorize an event that will have comparable public visibility and a similar route, location and date to that of the proposed event." Thus, the ordinance does not restrict speech, but regulates the *time, place and manner* of marches designed to present speech.

However, that does not end the question, because not all time, place and manner restrictions pass constitutional muster. Time, place and manner restrictions "are constitutional, if they: (1) are justified without reference to the content of the regulated speech; (2) are narrowly tailored to serve a significant government interest; and (3) leave open ample alternative channels for communication of the information." DiMa Corp. v. Town of Hallie, 185 F.3d 823, 828 (7th Cir.1999).

In this case, those aspects of Chicago's parade ordinance which MacDonald challenges are justified without reference to the content of the marchers' speech. First, the ordinance requires the Commissioner to determine whether the proposed activity will interfere with traffic. This determination does not depend on the content of the march's speech. Nor does the provision of the ordinance requiring the Commissioner to determine whether the concentration of parade participants will prevent proper fire and police protection consider the content of the speech. These are safety considerations

that are neutral by any objective standard.

The final challenged aspect of the ordinance, however, requires a closer examination. Under subsection (h)(2) the Commissioner must determine whether "[t]here are available ... a sufficient number of peace officers to police and protect lawful participants in the activity and non-participants from traffic related hazards in light of the other demands for police protection at the time of the proposed event or activity." Relying on Forsyth County, Ga. v. Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992), the district court concluded that subsection (h)(2) constitutes a content-based regulation of speech because it believed that the Commissioner would necessarily consider the content of the marchers' message in order to assess policing needs. (He thought sections (1) and (3) covered the safety issues, so section (2) would be more concerned with content.)

The district court's reliance on Forsyth County for this conclusion was misplaced. Unlike this case, Forsyth involved an assessment of fees to help cover the cost of police protection. There the Supreme Court held that an ordinance which required groups seeking demonstration permits to pay for the estimated costs of police protection for the demonstrators violated the First Amendment because it required the county to first examine the content of the demonstrators' message in order to "estimate the response of others to that content, and to judge the number of police necessary to meet that response." Id. at 134. In contrast, subsection (h)(2) instructs the Commissioner to consider only the

availability of police to protect participants from *traffic hazards*. The *1033 content of the marchers' speech lacks any bearing in that assessment. In Forsyth the county had to determine the cost of providing police protection for the demonstrators based on all dangers, but most significantly the potential for a violent response to the speech. The fee provision was "invalid because it unconstitutionally tie[d] the amount of the fee to the content of the speech...." But cost is not the concern here. Moreover, in most situations the Commissioner does not even know the content of the marchers' speech as the permit application does not request such information. Rather, the question in section (2) is the availability of sufficient police resources at a particular time and place to protect marchers from traffic hazards. Thus, the Chicago ordinance is readily distinguishable from the ordinance in Forsyth County, and in contrast to that ordinance lacks any content-based consideration.

The dissent contends that this case is no different than Forsyth County, arguing that the City's assessment of the number of officers needed to protect participants and non-participants from traffic hazards may depend on the purpose (speech content) of the parade. Dissent at 1039-40. On the contrary, there are two distinct differences from Forsyth County. First, the plain language of Chicago's ordinance makes clear that the Commissioner should consider only "traffic-related hazards." Second, the Commissioner does not know the content of the speech because the permit application does not ask for any information about the purpose of the parade or the motive of the participants. § 10-8-330(e). If the Commissioner or the police impose rules

or restrictions beyond those specifically set forth in the ordinance, an as- applied challenge may be in order. But in the facial challenge before this court there is no evidence that content has anything to do with the Commissioner's assessment of the permit application.

The dissent also maintains that Chicago's ordinance is more restrictive than the one in Forsyth County, because "there is no amount a marcher can pay to be allowed to march if the City decides the burdens are too great." Dissent at 1039. However, contrary to the dissent's concern, the Chicago ordinance bars no one from marching; rather, if the City determines that traffic hazards are too great and police protection insufficient for that time and place, then the City *must* "authorize the conduct of a parade, public assembly or athletic event on a date, at a time, at a location, or over a route different than that named by the applicant. This alternate permit shall to the extent practicable authorize an event that will have comparable public visibility and a similar route, location and date to that of the proposed event." Municipal Code of Chicago, Ill. § 10-8-330(*l*). Because the City *must* authorize the parade or other event, hecklers cannot veto unpopular speech "by threatening to show up in large numbers and create traffic hazards of their own." Dissent at 1040.

Thomas also supports the conclusion that Forsyth County is distinguishable from the case at hand. In Thomas, the plaintiffs had argued that the park-permit ordinance's requirement that applicants obtain $1 million in liability insurance created a heckler's veto prohibited by Forsyth. This court rejected that argument noting

that "the amount of insurance required is not based on, or, so far as has been shown, influenced by, the nature of the event, and specifically by whether it involves controversial expressive activity likely to incite violence by onlookers or opponents." Thomas, 227 F.3d at 925. Rather, the cost of the insurance considered factors such as "the size of the event and the nature of the facilities involved in it (a bandstand, stage, tents, and so forth)." Id. Similarly, in this case, to determine whether "a sufficient number of peace officers" are available to protect participants and non-participants "from traffic related hazards" requires only a consideration of the size of the parade and its nature, i.e., its route and time--it does not *1034 inject content into the City's consideration of the permit application.

> On appeal, notwithstanding the City's extensive analysis of this issue, MacDonald fails to present a case justifying the district court's view that the ordinance is content-based, stating merely in a footnote that the district court's conclusion was obviously correct.

A time, place and manner restriction must also be narrowly tailored to serve a significant government interest. Chicago Ordinance 10-8-330 promotes a significant government interest, primarily the safety of citizens, and specifically the organized, effective, and safe flow of traffic, including emergency vehicles. The regulation is also narrowly tailored to promote these interests, first by requiring an individualized assessment

of the proposed march vis-a-vis these concerns, and second by requiring the City to tailor an alternative route which does not interfere with safety, traffic and emergency services. While this second rationale also ensures ample alternative channels of communication, see *infra* at 1034, it assures that the ordinance is narrowly tailored to the City's interests by requiring the next-best route be offered to the applicant. Moreover, absent this ordinance, the City could be in disarray, with marchers interrupting the flow of workers and sightseers, delivery trucks, buses, and emergency vehicles, as well as other marchers deciding to rally at the same place and on the same day. The government's interest in organizing these potential disruptions would "clearly be achieved less effectively absent the regulation." Ward v. Rock Against Racism, 491 U.S. 781, 801-02, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989). Accordingly, we conclude that Section 10-8-330 satisfies the "narrowly tailored" prong.

Finally, to be constitutional, the time, place and manner restrictions must ensure ample alternative channels of communication in the event that a permit is denied. The ordinance also does this because, as just noted, if the Commissioner denies a permit application, it must "authorize a parade or other public assembly at a time, location and over a route that is to the extent practicable comparable in public visibility and similar in location and date to that requested." Thus, ample alternative channels exist in the event the City denies the proposed parade route.

In sum, because Section 10-8-330 is justified without

reference to the content of the regulated speech; is narrowly tailored to serve a significant government interest; and leaves open ample alternative channels for communication of the information, it constitutes a valid time, place and manner regulation of speech.

C. Procedural Safeguards

MacDonald also argues that Chicago's parade-permit ordinance is unconstitutional because it fails to provide the procedural safeguards set forth in Freedman v. State of Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). In Freedman, the Supreme Court considered the constitutionality of a Maryland statute that required a motion picture exhibitor to submit films, in advance of their exhibition, to the Maryland State Board of Censors which would approve and license the film if it "was moral and proper" and would refuse a license if the film was "obscene or tended to debase or corrupt morals or incite to crime." Id. at 52 n. 2, 85 S.Ct. 734. The Supreme Court struck the law as an unconstitutional prior restraint, and in doing so set forth three procedural safeguards designed to obviate the dangers of censorship. Specifically, the Freedman Court mandated that: (1) any prior restraint ... be imposed only for a brief period of time, during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech, and must bear the burden of proof once in court. Id. at 58-59, 85 S.Ct. 734. MacDonald contends that Section 10- 8-330 fails to provide safeguards two and three, and that it is therefore an unconstitutional prior restraint.

*1035 MacDonald first argues that the ordinance fails to guarantee prompt judicial review. However, contrary to MacDonald's position, the Chicago Ordinance allows for judicial review. Specifically, Section 10-8-330 provides that the Commissioner's decision may be appealed to the mayor and the mayor's decision is then "subject to judicial review in accordance with applicable law." In Illinois, judicial review of a decision to deny a permit application may be had in state court by a writ of common law certiorari. This is not good enough, according to MacDonald: MacDonald argues that the Freedman "prompt judicial review" safeguard requires more than a possibility of judicial review--it requires the guarantee of a prompt decision on the merits.

The circuits are split on this issue. The Fourth, Sixth and Ninth Circuits have held that prompt judicial review requires a prompt decision on the merits. 11126 Baltimore Blvd., 58 F.3d at 1000-01 ("prompt judicial review" requires "prompt judicial determination"); Nightclubs, Inc. v. City of Paducah, 202 F.3d 884, 892 (6th Cir.2000) ("[T]his Circuit and a number of other circuits have held that a licensing scheme must reasonably ensure a prompt judicial determination, and not mere access to judicial review."); Baby Tam & Co., Inc., 154 F.3d at 1101 (" 'prompt judicial review' means the opportunity for a prompt hearing and a prompt decision by a judicial officer"). Conversely, the First, Fifth and Eleventh Circuits have held that for permit and licensing ordinances, prompt judicial review only requires access to prompt judicial review. Jews for Jesus, Inc. v. Massachusetts Bay Transp. Auth., 984 F.2d 1319, 1327 (1st Cir.1993) ("prompt judicial review" is provided

where applicant may appeal license denial in court); TK's Video, Inc., 24 F.3d at 709 (holding that ordinance which gives an unsuccessful license applicant 30 days to appeal to the district court satisfies the "prompt judicial review requirement"); Boss Capital, Inc., 187 F.3d at 1256 (for licensing ordinances, prompt judicial review only means access to prompt judicial review).

> It is unclear exactly where the Second Circuit stands. *Compare* Beal v. Stern, 184 F.3d 117, 129 (2d Cir.1999) ("prompt *access* to judicial review in state courts would satisfy Freedman") (emphasis added), with MacDonald v. Safir, 206 F.3d 183 (2d Cir.2000) (noting that Beal held that "prompt access to judicial review in state courts would satisfy Freedman," but concluding that the record was insufficient to determine whether available state court proceedings satisfied that requirement).

While the circuits are split on this issue, this court has recently made clear in Thomas that in this circuit a common law certiorari proceeding "is good enough for a regulation of expressive activity when the regulation is not a form of censorship, that is, does not require or permit the regulatory authority to evaluate the content or message of the activity regulated." Thomas, 227 F.3d at 926 (citing fractured opinion in Graff and "counting noses" to reach this conclusion). Because this case--like Thomas--involves a permit regulation that is not a form of censorship and that does not evaluate the content or

the message of the activity, judicial review through Illinois' common law certiorari proceedings satisfies constitutional scrutiny.

MacDonald also argues that the parade-permitting ordinance fails to satisfy the third safeguard established in Freedman, that being that the government bears the burden of going to court if it wants to deny the permit, and once in court, it must bear the burden of proving that the denial is constitutional. However, this third Freedman safeguard was established in a case addressing censorship. Following Freedman, the Supreme Court considered the need for this safeguard in the context of a licensing statute. FW/PBS, Inc. v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990). In FW/PBS, a plurality of the Court concluded that the third safeguard was required only in those situations in which "the censor engaged in direct censorship of particular expressive material." Id. at 229, 110 S.Ct. 596. Because *1036 the censoring ordinance in FW/PBS did "not exercise discretion by passing judgment on the content of any protected speech," the Court's plurality concluded that "the First Amendment does not require that the city bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." Id. at 230, 110 S.Ct. 596.

This court has likewise concluded, based on the rationale of FW/PBS, that a content-neutral licensing or permit statute need not include a provision requiring the government to bear the burden of going to court to deny a permit. Thomas, 227 F.3d at 926-27. *See also,* Graff, 9 F.3d at 1324 n. 11; id. at 1330 (Flaum, J. concurring)

("Further, after FW/PBS, it seems likely that Freedman's third requirement--that the licensor bear all court-related burdens--does not apply in this case."). *Accord,* Beal v. Stern, 184 F.3d 117, 128 (2d Cir.1999) (because park permit ordinance was content-neutral prior restraint, it "need comply with only the first two Freedman factors."). Therefore, based on FW/PBS, Thomas and Graff, we conclude that Chicago ordinance Section 10-8-330 need not satisfy the third Freedman standard.

Before closing, we note that our conclusion that the third Freedman factor does not apply to Chicago's parade-permit ordinance acknowledges not only the legal distinction between censorship and a content-neutral licensing scheme--it recognizes the practical reality of the situation. The third Freedman factor is completely unworkable in the context of the parade-permit process. Consider the typical scenario in which an applicant requests a specific parade route, date and time. But it is rush hour, or another parade is scheduled, or the day-to-day affairs of the city are too greatly affected to allow the exact time and place of the requested route, so the City seeks to accommodate the speech by proposing an alternative route. However, if the third Freedman factor applies, any time the City failed to accede to the marchers' demands it would be forced to first go to court to prove its case. Even as the City proceeds in court, new permit applications come in, requiring the Commissioner to consider the public safety concerns set forth in the Ordinance. But he can't because his earlier decisions are not yet final--they are tied up in court. And if a court then mandates a certain route or time which the Commissioner had previously denied, that could impact

several other decisions (that were not contested) that the Commissioner has made in the meantime about locations and times, police availability, and traffic flow. It is unclear how the Commissioner could possibly function under such a court-imposed structure. But because the Chicago Ordinance is not a device of censorship, the third Freedman factor does not apply, and the City of Chicago will not be required to initiate legal action before denying or altering an application for a parade permit.

III. Conclusion

Chicago oversees parades and marches throughout the city to ensure not only the safety of people who regularly use these routes but also the safety of participants and parade-goers alike, and to allow for the prompt and efficient flow of traffic and emergency vehicles. This is a content-neutral time, place and manner restriction, justified by its purpose--not its content--and it is narrowly tailored to serve a significant governmental interest, while leaving open ample channels of communication. Section 10-8-330 also does not unconstitutionally vest the Commissioner with unfettered discretion. Moreover, because Section 10-8-330 is not a form of censorship, but a time, place and manner restriction, Illinois' common law certiorari process is constitutionally adequate. For these reasons, we REVERSE the district court's decision declaring the ordinance an unconstitutional prior restraint.

ILANA DIAMOND ROVNER, Circuit Judge, concurring in part, dissenting in part.

Our recent opinion in *1037Thomas v. Chicago Park District, 227 F.3d 921 (7th Cir. 2000) answered some but not all of the questions raised in this appeal. That case involved essentially the same parties we have here, the Windy City Hemp Development Board and a sub-unit of the City of Chicago, namely, the Chicago Park District. In that case, Windy City Hemp challenged a Park District regulation that restricted the use of the City's parks for gatherings, including political rallies. The Park District regulation required that a permit be obtained for any assembly in a park by a group of 50 or more persons. The regulation spelled out the criteria for the grant of a permit, the procedures for obtaining it, and the process for challenging the denial of a permit. We found that the Park District regulation did not vest unfettered discretion in the government official charged with issuing permits, and that the regulation was not impermissibly vague. We also held that requiring applicants to obtain liability insurance did not amount to a heckler's veto because the amount of insurance required was based not on the content of the speech but rather on the size of the event and the nature of the facilities involved. We further found that the regulation's requirement for a 30- to 60-day lead time for permit processing was reasonable in light of the attendant administrative burden and was not harmful to speech in light of exceptions the City allowed for spontaneous rallies in reaction to current events. Finally, we rejected Windy City Hemp's main objection, that the regulation failed to adequately provide for

judicial review of permit denials. We found that Illinois' procedure for common law certiorari was an adequate means of review, and that alternate channels of review were available in federal court. We therefore concluded that the Park District regulation did not unconstitutionally impinge on Windy City Hemp's First Amendment rights.

MacDonald now challenges the City's requirement that he obtain a permit in order to hold a parade on the City's streets. I agree with the majority that the amended version of the ordinance is the only one before us on review. The amended parade ordinance is considerably more vague than the Park District regulation. Rather than objective criteria regarding the number of participants and the nature of the facilities, the ordinance sets forth a number of subjective factors that the City may use to deny a permit to march on city streets. The City may deny a permit if the proposed activity will "substantially and unnecessarily" interfere with traffic, if there are insufficient numbers of police officers available to protect participants and non-participants from traffic-related hazards, and if the concentration of persons or things on the route will prevent proper fire and police protection or ambulance service. Under this scheme, it is not difficult to see how the City might decide that a parade honoring the Chicago Bulls that snarls traffic for miles does not "substantially or unnecessarily" interfere with traffic, but that MacDonald's small band of marijuana protesters will overwhelm City resources and interfere with traffic to an unacceptable level. Nonetheless, the ordinance is not so subjective on its face that it allows an exercise of

"unfettered discretion," *1038 especially in light of the fact that judicial review is readily available. I therefore concur with the majority's conclusion on that issue.

Lest we think this discussion is purely academic, Mayor Rudolph Giuliani of New York recently reminded us that cities do attempt to censor controversial messages. *See Giuliani Forms 'Decency' Panel to Review Public Art*, L.A. TIMES, Feb. 17, 2001, at A24. Offended by a photograph displayed at the Brooklyn Museum of Art, the Mayor announced that he was forming a task force to monitor decency in tax-sponsored art exhibits. The photograph depicted a nude African-American woman as a Christ-like figure at the Last Supper. Giuliani had previously cut off funds from that same museum when he was offended by an earlier display. A federal court declared the funding freeze unconstitutional, and the City restored the funds. Similarly, Chicago is not immune to the phenomenon of government censorship. *See* Alf Siewers & Ray Hanania, *Controversial Painting Leads to Brush with Law*, CHI. SUN-TIMES, May 12, 1988, at 1. Three City alderman removed a controversial painting from the wall of a museum associated with the School of the Art Institute, and the police then impounded the painting. The painting depicted the late Mayor Harold Washington in a manner that many found offensive.

I part company with the majority, however, on the issue of whether the ordinance impermissibly allows a heckler's veto. *See* Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 112 S.Ct. 2395, 120 L.Ed.2d 101 (1992). The ordinance challenged in Forsyth County provided that every parade permit applicant "shall pay in advance for such permit, for the use of the County, a sum not more than $1,000.00 for each day such parade, procession, or open air public meeting shall take place." 505 U.S. at 126, 112 S.Ct. 2395. Moreover, the county administrator was empowered to "adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." 505 U.S. at 127, 112 S.Ct. 2395. A group of white supremacists sought to march in opposition to the federal holiday celebrating the birth of Martin Luther King. The county set a fee of $100 for the permit. Rather than pay the fee, the would-be marchers sued the county. The Supreme Court noted that sometimes the county included all of the administrative and police expenses in the fee, and sometimes included only a portion of those costs in the fee. As construed by the county, the Court noted, the ordinance often required that the fee be based on the content of the speech. 505 U.S. at 133-34, 112 S.Ct. 2395. The ordinance did not explicitly state that fees were based on content, of course. Rather, the ordinance allowed the county administrator to assess a fee to cover the cost of protecting persons participating in or observing the parade. In order to assess accurately the cost of security for parade participants, the administrator necessarily "examine[d] the content of the message that is conveyed." 505 U.S. at 134, 112 S.Ct. 2395 (quoting Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230, 107

S.Ct. 1722, 95 L.Ed.2d 209 (1987)). The administrator would also have to estimate the response of others to the content and judge the number of police necessary to meet that response. Thus, the "fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content." Forsyth County, 505 U.S. at 134, 112 S.Ct. 2395.

The County argued that, although the cost of policing relates to content, the ordinance itself was content neutral because it was aimed at a secondary effect, the cost of maintaining public order. The Forsyth Court noted that, nevertheless, "it cannot be said that the fee's justification 'ha[s] nothing to do with content.' " 505 U.S. at 134, 112 S.Ct. 2395 (citing Ward v. Rock Against Racism, 491 U.S. 781, 792, 109 S.Ct. 2746, 105 L.Ed.2d 661 (1989)). The Court explained,

> The costs to which petitioner refers are those associated with the public's reaction to the speech. Listeners' reaction to speech is not a content-neutral basis for regulation.... Speech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob.

Forsyth County, 505 U.S. at 134-35, 112 S.Ct. 2395 (citations omitted). The Court concluded that regulations which permit the government to discriminate on the basis of the content of the message cannot be tolerated under the First Amendment. The Court also held that although raising revenue for police services was undoubtedly an important government goal, it did not justify a content-based permit fee.

Acknowledging that Forsyth County is good law, the

majority seeks to distinguish it. *Supra* at 1032-34. The majority notes that, unlike the Chicago parade ordinance, the Forsyth County ordinance involved an assessment of fees to help cover the cost of police protection. The Chicago ordinance directs the Commissioner to consider the availability of police to protect participants from traffic hazards only, and according to the majority, the words "traffic hazards" are determinative here--because the Commissioner *1039 assesses the need for officers only in terms of traffic hazards, the content of the marchers' speech purportedly is not implicated. *Supra* at 1032. In Forsyth County, by contrast, the county commissioner calculated the cost of providing police protection for demonstrators based on all dangers but most significantly considered the potential for violent response to the speech. The fee was thus tied to the content of the speech. The majority sees the Chicago ordinance as different in three respects. First, the Chicago ordinance does not involve fees at all. Second, the only hazard the City must consider in denying or granting a permit is whether there are sufficient police officers available to protect participants (and non- participants) from traffic perils. Third, because the Commissioner does not necessarily even know the content of the speech when making that determination, the ordinance lacks content-based discrimination, according to the majority.

That Forsyth County involved a fee-based permit is certainly not determinative. In fact, the Chicago ordinance is more restrictive than Forsyth County's law in the sense that the ban on speech is outright; there is no amount a marcher can pay to be allowed to march if

the City decides the burdens are too great. Forsyth County itself acknowledged that "[s]peech cannot be financially burdened, any more than it can be punished or banned, simply because it might offend a hostile mob." 505 U.S. at 134-35, 112 S.Ct. 2395. Thus, a fee is no different from a ban, and in fact might be less intrusive; but under Forsyth County both a fee and a ban based on content cannot stand.

I believe it is disingenuous for the City to claim it does not know the content of the speech before a particular event, and therefore does not consider the content in determining whether the permit shall issue, or in determining whether the crowd size (including hecklers) will be prohibitive. First, the permit application requires the name of both the person signing the application, and the name of the "authorized and responsible leaders of the organization conducting the parade." Chicago Ordinance § 10-8-330(e)(1)-(2). More often than not, the name of the organization alone will tip the City off to the content of the proposed speech, as was certainly true in this case. The City could not seriously contend that it did not know what message would be conveyed by the Windy City Hemp Development Board. Indeed, most of the organizations whose speech is controversial and who are most at risk for censorship are readily recognizable from their names. *See* Collin v. Smith, 578 F.2d 1197 (7th Cir.1978), *cert. denied*, 439 U.S. 916, 99 S.Ct. 291, 58 L.Ed.2d 264 (1978) (suit allowing the National Socialist Party of America, a Nazi organization, to march through Skokie, Illinois); Hurley v. Irish- American Gay, Lesbian and Bisexual Group of Boston, 515 U.S. 557, 115 S.Ct. 2338, 132 L.Ed.2d 487 (1995) (suit prohibiting gay

and lesbian organization from participating in Boston's St. Patrick's Day parade).

Second, the City requires the applicant to estimate the approximate number of persons to participate in the parade, and to inform the City of the basis on which this estimate is made. Chicago Ordinance § 10-8-330(e)(5). If the Commissioner denies a permit for failure to provide sufficient information about the crowd estimate, the Commissioner will inform the applicant of what additional information must be provided in a new or amended application. Chicago Ordinance § 10-8-330(*l*). These last two factors combine to require the applicant to provide the City with the information necessary for the City to estimate the response (including the hostile response) to the parade. Because the applicant is required to provide the basis for the crowd estimate, the content of the speech and its potentially controversial nature are necessarily implicated. In effect, the applicant is required to inform the City of the content of the speech if the content (and the controversial nature) of the speech affects the crowd estimate. Having required the applicant *1040 to provide this information, the City may not then deny that it is using that information in deciding whether to issue a permit.

Nor do I see how the words "traffic hazards" save the ordinance from the dictates of Forsyth County. Counter-protestors are just as likely to threaten to spill out into the streets as they are to assault marchers. When the City is assessing whether it has adequate numbers of peace officers to protect both participants and non-participants from traffic hazards, it is necessarily

considering both the number of counter-demonstrators and the possibility of unruliness and violence. The Supreme Court rejected Forsyth County's characterization of its ordinance as content-neutral on the grounds that it was aimed at a secondary effect--the cost of maintaining public order. 505 U.S at 134, 112 S.Ct. 2395. In the Court's view, because the secondary effect with which the County purported to be concerned was entwined with the message that the permit-seekers sought to convey, "it cannot be said that the fee's justification 'ha[s] nothing to do with content.' " 505 U.S at 134, 112 S.Ct. 2395 (quoting Ward, 491 U.S. at 792, 109 S.Ct. 2746). Likewise, in Chicago, it cannot be said that assessing the number of officers needed to protect participants and non-participants from traffic hazards has nothing to do with content of the proposed parade. In some part, that assessment will be based on the size of any counter-demonstration that might ensue, on the level of hostility that the parade might generate. Traffic is difficult in a city like Chicago on the best of days, and it can be disrupted by even minor mishaps. It is therefore easy to imagine that the City might deem even a small parade too great a threat to the orderly flow of traffic if the content of the parade strikes the City regulators as controversial. In effect. under the Chicago ordinance, counter-protestors can apply their heckler's veto by threatening to show up in large numbers and create traffic hazards of their own.

Although the ordinance provides that the City must issue "to the extent practicable" a permit to hold the parade on an alternate date or on an alternate route with comparable visibility, in the very least hecklers are given

the power to delay or move the event. Timing and location can be integral to the message, and I believe Forsyth County does not allow the City to convey this power to hecklers. Chicago is a city of neighborhoods, each with its own distinct character. A march through the Back of the Yards neighborhood would be no substitute for a march through nearby Bridgeport when the purpose of the march is to protest a racially motivated attack on an African-American youth who happened into the mostly white neighborhood. *See* Cindy Schreuder & Heather Lalley, *Hopes Rise for Teen a Week After Beating Victim Stirs from His Coma as 150 March in Bridgeport*, CHI. TRIB., March 29, 1997, at 1. A directive to provide "comparable public visibility" on a "similar route" can strip the message of most of its meaning.

Moreover, I do not believe that the Park District case supports the majority's contention that the Chicago parade ordinance does not offend Forsyth County. It is true that the cost of the liability insurance in Thomas was related to the size of the event and the nature of the facilities utilized, and not to the content of the speech or the potential for violent response to the speech. The majority contends that determining whether there are sufficient peace officers to handle traffic-related hazards similarly requires only a consideration of the size of the parade, its route and time. Those considerations may certainly come into play, but the ordinance does not limit the City to such objective factors. It allows the City to subjectively determine whether the burden on municipal resources is too great to allow the parade to go forward, without reference to any standards. Under Forsyth

County, any law requiring a license before protected speech may take place must contain narrow, objective, and definite standards to guide the licensing authority. 505 U.S. at 131, 112 S.Ct. 2395 (citing Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969)). The reason for this, according to the Supreme Court, *1041 is that when a permit scheme allows the appraisal of facts, the exercise of judgment and the formation of an opinion by an uncabined licensing authority, the danger of censorship is too great. *See* Forsyth County, 505 U.S. at 131, 112 S.Ct. 2395 (citing Cantwell v. State of Connecticut, 310 U.S. 296, 303, 60 S.Ct. 900, 84 L.Ed. 1213 (1940) and Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 95 S.Ct. 1239, 43 L.Ed.2d 448 (1975)). The Chicago parade ordinance allows not only the appraisal of facts and exercise of judgment warned against in Forsyth County and other cases, but also grants City officials free reign to consider the effect of counter-demonstrations on its ability to protect against traffic hazards. Therefore, unlike the park ordinance, the parade ordinance allows the City to deny permits based on a heckler's veto. The Supreme Court has not repudiated Forsyth County and I do not believe this Court should do so on its own. Therefore, I respectfully dissent.

United States District Court, N.D. Illinois.

Robert MACDONALD, Plaintiff,
v.
CITY OF CHICAGO, Defendant.

No. 97 C 5266.

Sept. 23, 1998.

MEMORANDUM OPINION AND ORDER

COAR, District J.

*1 Before this court, are the parties' cross motions for summary judgment. Plaintiff brought this lawsuit pursuant to 42 U.S.C. § 1983, to challenge a certain provision in the Code of Ordinances of the City of Chicago. Plaintiff seeks a judgment declaring that the challenged ordinance violates the First Amendment to the United States Constitution, and an injunction permanently prohibiting its enforcement. Both parties have filed motions for summary judgment on all of plaintiff's claims. For the reasons set forth below, plaintiff's motion is GRANTED in part, and DENIED in part, and the City's motion is GRANTED in part, and DENIED in part.

Facts

Defendant, City of Chicago (the "City"), is an Illinois

municipal corporation organized under the laws of the state of Illinois. (Deft's 12(M) Stmt. § 2.) Venue is proper in the Northern District of Illinois because the city is located within this judicial district and the events giving rise to this action occurred within this judicial district. (Deft's 12(M) Stmt. § 4.)

Plaintiff, Robert MacDonald ("MacDonald" or "plaintiff"), is a citizen of Illinois. (Deft's 12(M) Stmt. § 1.) He is an activist in a political movement "to change the laws of the United and several states prohibiting the sale and possession of cannabis, to educate the public as to the need for a change, and to raise public support" for his political cause. (Verified Cplt. § 5.) MacDonald has organized and been involved in political parades in Chicago in the past, and intends to do the same in the future. (*Id.* § 6.)

In June 1997, MacDonald applied for a permit to conduct a parade in the streets of downtown Chicago. Plaintiff wanted to run his parade through the central business district of the City starting at 1:00 p.m. on August 23, 1997, in conjunction with a political rally in Grant Park.

> The proposed parade route began in Grant Park at Columbus Drive, went west along Jackson to Michigan Avenue, south to Congress Parkway, west on Congress to Clark Street, north on Clark to Van Buren Street, at which point a 30-minute rally was to be conducted in front of the Metropolitan Correctional Center (MCC),

> continued north on Clark to Adams Street, south to Federal Plaza, at which point another rally was to be staged for the duration of one hour, east on Adams to State Street, north on State to Wacker Drive, east on Wacker to Michigan, Michigan to Chicago Avenue, south to Monroe Street, east to Columbus and Grant Park where the parade was to disband. (Pl.Appl. n. 1.)

The rally was the subject of another lawsuit, in which MacDonald challenged the constitutionality of the Park District Code that requires a permit for certain types of events in Chicago's parks. The Seventh Circuit recently upheld the constitutionality of those provisions. *See* MacDonald v. Chicago Park District, 132 F.3d 355 (7th Cir.1997).

Section 10-8-330(b) of the Chicago Code (the "Ordinance") requires that anyone who plans to conduct a parade on any public street or sidewalk obtain a permit from the Commissioner of the Chicago Department of Transportation (the "Commissioner"). (Ver.Cplt.§ 12). Section 10-8-330(h) provides in pertinent part that, upon investigating the facts set forth in a permit application, the Commissioner shall issue a permit when he or she finds that:

(1) The proposed activity will not substantially or unnecessarily interfere with traffic in the area contiguous to the route;

(2) There are available at the time of the parade, public assembly or athletic event a sufficient number of peace officers to police and protect lawful

participants in the activity;
(3) The concentration of persons, animals, vehicles, or things at the assembly and disbanding areas and along the parade or athletic event route will not prevent proper fire and police protection or ambulance service;
(4) The event is not being conducted for an unlawful purpose ....

(*See id.* § 13).

On June 25, 1997, plaintiff filed an application for a parade permit. (*Id.* § 15). The City denied MacDonald's application (Deft's 12(M) Stmt. § 6), specifying three reasons for the denial:
*2 A. "The proposed activity will substantially and unnecessarily interfere with traffic;"
B. "there are not available a sufficient number of peace officers to police and protect participants;" and
C. "the concentration of things at the assembly and along the route will prevent proper fire and police protection and ambulance service."

(Verified Cplt. § 16).

MacDonald filed the present action seeking declaratory and injunctive relief and filed a motion for preliminary injunction seeking permission to conduct his proposed parade on August 23, 1997. (Deft's 12(M) Stmt. § 8.) After fully briefing the motion for preliminary injunction, the parties reached an agreement allowing Plaintiff to conduct a much more limited parade than

the one he originally sought. (*Id.* § 9.) Accordingly, this court denied the motion for preliminary injunction as moot.

On January 8, 1998, MacDonald filed for another parade permit to conduct a parade scheduled for May 9, 1998 at 11:00 a.m. (Pltf's Second Application for Preliminary Injunction § 9.) The proposed route was virtually identical to the route he originally applied for in August 1997. On January 9, 1998, the Department of Transportation notified plaintiff that his application for permit had been denied, but suggested an alternative parade route. (*Id.* § 11.) The permit was denied for the same reasons plaintiff's first application was denied. (*Id.* § 12.) On April 15, 1998, MacDonald filed a second "application" for preliminary injunction. On or about April 27, 1998, the parties settled their differences with respect to plaintiff's May 9, 1998, parade through downtown Chicago, and the second application was withdrawn and terminated.

The parties have filed and briefed cross motions for summary judgment on plaintiff's claims for declaratory and injunctive relief. In addition, the City filed a supplemental motion for summary judgment on the issue of whether McDonald has standing to continue to pursue his facial challenge to the City's parade permitting ordinance.

Analysis

I. Standing

The City argues that MacDonald does not have standing to pursue this claim because he cannot show an "injury in fact." The City claims that, because the parade that was the subject of plaintiff's original motion for preliminary injunction has come and gone, plaintiff cannot allege that he has been or will continue to be injured as a result of the challenged Ordinance. Thus, the City reasons, MacDonald does not have standing to pursue a constitutional challenge to the Ordinance.

The City does not assert, however, that MacDonald lacked standing when he filed his verified complaint and "application" for preliminary injunction. The standing requirement is comprised of three elements. First, plaintiff must have suffered an "injury in fact" which is "concrete and particularized" and "actual or imminent." Lujan v. Defenders of Wildlife, 504 U.S. 555, 560, 112 S.Ct. 2130, 2136, 119 L.Ed.2d 351 (1992) (citations omitted). Second, plaintiff must show a causal connection between the injury and the conduct of which he complains. Id. Third, "it must be 'likely' as opposed to merely 'speculative,' that the injury will be 'redressed by a favorable decision." ' Id. (quotations omitted). MacDonald clearly met the standing requirements at the time he filed his lawsuit--he suffered an imminent injury in fact (the denial of a permit to conduct his parade); there was a causal connection (the permit requirement prevented him from conducting his parade), and; the injury would have been redressed by a favorable decision (enjoining enforcement of the Ordinance would have allowed MacDonald to conduct his parade).

*3 As posed by the City, the issue is whether the change in circumstances, namely that two parades were conducted with a limited route, caused MacDonald to lose his standing. Because it is undisputed that MacDonald had standing at the time this case was filed, this court believes that "mootness" rather than "standing" is the proper inquiry. "Mootness has been described as 'the doctrine of standing set in a time frame: The requisite personal interest that must exist at the commencement of litigation (standing) must continue throughout its existence (mootness)." ' Arizonans for Official English v. Arizona, 520 U.S. 43, 117 S.Ct. 1055, 1069, n. 22, 137 L.Ed.2d 170 (1997) (quoting United States Parole Comm'n v. Geraghty, 445 U.S. 388, 397, 100 S.Ct. 1202, 1209, 63 L.Ed.2d 479 (1980)).

Unlike standing, however, there is an important exception to the mootness doctrine for injuries that are "capable of repetition, yet evading review." Honig v. Doe, 484 U.S. 305, 318, 108 S.Ct. 592, 601, 98 L.Ed.2d 686 (1988). "This doctrine applies only if there is 'a reasonable expectation that the same complaining party would be subjected to the same action again." ' Orion Sales, Inc. v. Emerson Radio Corp., 148 F.3d 840 (7th Cir.1998) (quoting Weinstein v. Bradford, 423 U.S. 147, 149, 96 S.Ct. 347, 46 L.Ed.2d 350 (1975); *see also* Honig, 484 U.S. at 318, 108 S.Ct. at 601, n. 6 ("we have found controversies capable of repetition based on expectations that, while reasonable, were hardly demonstrably probable"). The court finds a "reasonable expectation" that MacDonald would again be subjected

to denial of a parade permit under the Ordinance at issue. In his complaint, McDonald claims that he has had parades in the past, and intends to hold parades in the future. (Verified Cplt. §§ 5-7.) Indeed, following the filing of the parties' summary judgment briefs, MacDonald applied for, and was denied, a permit for another parade. It is thus reasonably likely that MacDonald will apply for parade permits in the future, especially given his intention to "educate the public as to the need for a change, and to raise public support" for the legalization of the sale and possession of cannabis. (Verified Cplt. § 5.) Accordingly, because the conduct MacDonald complains of is "capable of repetition, yet evading review," his claims are not moot.

The City cites Not on the Guest List Coalition v. City of Chicago, 1997 WL 457505 (N.D.Ill.1997), in support of its argument that plaintiff no longer has standing to challenge the validity of the parade permit ordinance. In that case, the court held that the plaintiffs no longer had standing to challenge a park district ordinance related to the issuance of permits for the use of public parks for First Amendment activities. The plaintiffs sought to march in conjunction with the Democratic National Convention in 1996. The court held that plaintiffs did not have standing to challenge the ordinance following the Convention because: "we are not told what plaintiffs intend to do that arguably might subject them to a threat of prosecution, or when, and they do not contend that any prosecution has been threatened.

Indeed, when they did seek to march they were neither prosecuted nor threatened with prosecution. They had a concrete plan, the City altered it to some extent, they obtained some of the relief they sought by this lawsuit, and they marched. The marches of the future and the City's possible reaction to them remain in the realm of speculation. And that is not enough." Id. at * 2. This court disagrees that plaintiff's claims should be considered under the rubric of standing, rather than mootness. Moreover, because MacDonald has demonstrated a pattern of marches as opposed to a single demonstration during the Democratic National Convention, this court finds that plaintiff has sufficiently demonstrated a likelihood of repetition.

II Constitutionality of Ordinance

The constitutionality of a law may be challenged in two ways: It may be challenged on its "face," or it may be challenged based on the manner in which it is "applied" to the person or party challenging the law. A regulation may be subject to facial review, even though its application in the case under consideration may be constitutionally unobjectionable. Forsyth County, Georgia v. Nationalist Movement, 505 U.S. 123, 129, 112 S.Ct. 2395, 2400-01, 120 L.Ed.2d 101 (1992). Indeed, "facial attacks on the discretion granted a decisionmaker are not dependent on the facts surrounding any particular permit decision ... the success of a facial challenge on the grounds that an

ordinance delegates overly broad discretion to the decisionmaker rests not on whether the administrator has exercised his discretion in a content-based manner, but whether there is anything in the ordinance preventing him from doing so." Id. at 133, 112 S.Ct. at 2403, n. 10. If the law is deemed unconstitutional on its face, it can never be applied. By contrast, if the court finds the law unconstitutional as applied, the law may still be enforced, but only under a set of circumstances different from that before the court.

*4 In his Verified Complaint, MacDonald submits that § 10-8-330 constitutes an unconstitutional prior restraint on his first amendment right to freedom of expression and freedom of assembly and is unconstitutional on its face. Specifically, plaintiff asserts that § 10-8-330 is facially unconstitutional on the following grounds:

A it allows the Commissioner of Transportation to grant or deny a permit for a parade in his/her unfettered discretion;

B. § 10-8-330(2) allows the Commissioner to deny a permit for an improper reason--the number of police which are required to "protect participants;"

C. § 10-8-330(h) fails to provide for prompt judicial review in the event a parade permit is denied;

D. § 10-8-330 does not require the Commissioner to state the specific reasons for a decision to deny a permit other than to copy the words of the ordinance, thus making judicial review meaningless; and

E. § 10-8-330(h) fails to require the Commissioner to seek judicial review if a permit application is denied, and fails to require that the Commissioner bear the

burden of justifying the denial in the judicial proceeding.

(Verified Cplt. § 17.) In his application for preliminary injunction, plaintiff further alleged that, " § 10-8-330(2) is a [sic] unlawful content- based restriction, in that it requires the Commissioner to consider the content of the parade participants' message in determining whether to permit the parade." (Plaintiff's Application for Preliminary Injunction § 12).

Section 10-8-330 provides in pertinent part that, upon investigating the facts set forth in a permit application, the commissioner of transportation shall issue a permit when he or she finds that:
(1) The proposed activity will not substantially or unnecessarily interfere with traffic in the area contiguous to the route;
(2) There are available at the time of the parade, public assembly or athletic event a sufficient number of peace officers to police and protect lawful participants in the activity;
(3) The concentration of persons, animals, vehicles, or things at the assembly and disbanding areas and along the parade or athletic event route will not prevent proper fire and police protection or ambulance service;
(4) The event is not being conducted for an unlawful purpose ....

Chicago Municipal Code § 10-8-330(h)(1)-(4). The statute further provides that, if an application is disapproved, the commissioner shall mail notice of its

decision, including the facts and conclusions forming the basis of its decision, to the applicant within two days after the application was filed. Id. at § 10-8-330(1). The applicant may then contest this decision by appealing to the mayor. Id. The decision of the mayor is then "subject to judicial review in accordance with applicable law." Id.

III Prior Restraint

The government engages in "prior restraint" of speech when it requires citizens or businesses to obtain permission before making protected speech. *See* Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151, 89 S.Ct. 935, 938- 939, 22 L.Ed.2d 162 (1969); Niemotko v. Maryland, 340 U.S. 268, 271, 71 S.Ct. 325, 327, 95 L.Ed. 267 (1951). The express language of § 10-8-330 leaves no doubt that it is purposed to operate as a prior restraint:

*5 "No parade, public assembly or athletic event is permitted on any portion of the public way of the city of Chicago unless a permit allowing such activity has been obtained from the department of transportation."

Chicago Municipal Code § 10-8-330(b).

All manner of prior restraint upon the exercise of First Amendment freedoms is heavily disfavored. Indeed, "[a]ny system of prior restraints of expression comes to th[e] Court bearing a heavy presumption against its constitutional validity." Bantam Books, Inc. v. Sullivan, 372 U.S. 58, 70, 83 S.Ct. 631, 639, 9 L.Ed.2d 584 (1963). Only a powerful overriding interest, such as

national security matters, obscenity, incitements to violence and overthrow of orderly government, can justify a narrowly drawn prior restraint. Stokes v. City of Madison, 930 F.2d 1163, 1169 (7th Cir.1991) (citing Near v. Minnesota, 283 U.S. 697, 716, 51 S.Ct. 625, 631, 75 L.Ed. 1357 (1931)). Absent the presence of these factors, prior restraints are permitted only "where procedural safeguards tightly control the discretion of the administrative authority and subject it to rapid judicial review." Id. "[T]he Court has recognized that government, in order to regulate competing uses of public forums, may impose a permit requirement on those wishing to hold a march, parade, or rally, *see* Cox v. New Hampshire, 312 U.S. 569, 574-576, 61 S.Ct. 762, 765-766, 85 L.Ed. 1049 (1941)." Forsyth, 505 U.S. at 130, 112 S.Ct. at 2401. Any such restraint must, however, meet certain constitutional requirements. Id. For example, the permit requirement "may not delegate overly broad licensing discretion to a government official." Id. (citing Freedman v. Maryland, 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965)).

In addition, in order for a permit regime to pass constitutional muster, it may only regulate the time, place, and manner of the protected activity, may not be content-based, and "must be narrowly tailored to serve a significant governmental interest, and must leave open ample alternatives for communication." Id. (citing United States v. Grace, 461 U.S. 171, 177, 103 S.Ct. 1702, 1706, 75 L.Ed.2d 736 (1983)); *see also* Shuttlesworth, 394 U.S. at 150-151, 89 S.Ct. at 938; Heffron v. International Soc'y for Krishna

Consciousness, Inc., 452 U.S. 640, 649, 101 S.Ct. 2559, 2565, 69 L.Ed.2d 298 (1981); Niemotko, 340 U.S. at 271, 71 S.Ct. at 327. The Supreme Court has further observed that, "[i]f the permit scheme 'involves appraisal of facts, the exercise of judgment, and the formation of an opinion,' Cantwell v. Connecticut, 310 U.S. 296, 305, 60 S.Ct. 900, 904, 84 L.Ed. 1213 (1940), by the licensing authority, 'the danger of censorship and of abridgment of our precious First Amendment freedoms is too great' to be permitted, Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553, 95 S.Ct. 1239, 1244, 43 L.Ed.2d 448 (1975)." Forsyth, 505 U.S. at 131, 112 S.Ct. at 2401- 02. Thus, " 'a law subjecting the exercise of First Amendment freedoms to the prior restraint of a license' must contain 'narrow, objective, and definite standards to guide the licensing authority." ' Id. at 131, 112 S.Ct. at 2401 (quoting Shuttlesworth, 394 U.S. at 150-51, 89 S.Ct. 938).

*6 The Court has expressly recognized the following as adequate procedural safeguards of first amendment expression: "First, the burden of instituting judicial proceedings, and of proving that the material is unprotected, must rest on the censor. Second, any restraint prior to judicial review can be imposed only for a brief period and only for the purpose of preserving the status quo. Third, a prompt final judicial determination must be assured." Southeastern, 420 U.S. at 560, 95 S.Ct. at 1247; *see also* Freedman v. Maryland, 380 U.S. 51, 56, 85 S.Ct. 734, 737, 13 L.Ed.2d 649 (1965). The court will address each challenge to the constitutionality of the § 10-8-330 in light of the foregoing principles.

A. *Unfettered Discretion.*

Plaintiff argues that § 10-8-330 confers "unfettered" discretion upon the Commissioner in determining whether permits for the exercise of protected speech in the public way of Chicago should issue. As a related argument, plaintiff submits that § 10-8-330 does not require the commissioner "to state the specific reasons for a decision to deny a permit other than to copy the words of the ordinance, thus making judicial review meaningless ...." (Pl.App.§ 12). The truth of the latter argument is belied by the express language of the statute: The commissioner, upon denying an application, "shall mail to the applicant ... a notice of his or her action, *stating the facts and conclusions* which are the basis for his or her denial of the permit." Chicago Municipal Code § 10-8-330(I) (emphasis added). As an objective matter, the language of the statute appears to assume more than a mere regurgitation of the statutory language; rather the Commissioner must disclose the specific set of circumstances that compel an abridgement of First Amendment freedoms. Because this court's inquiry is limited to the facial constitutionality of the statute, the court finds that plaintiff's contention has no basis in light of the express language of the statute.

Plaintiff bases the remainder of his argument on specific language in the statute. Specifically, plaintiff contends that the terms "substantially" , "unnecessarily" , "sufficient" , "concentration" and "proper" have "no meaning", and thus, allow for the unlawful exercise of

discretion. (Pltf's Memorandum in Support of Preliminary Injunction). In support of his argument, plaintiff relies on several prominent Supreme Court cases in the area of "prior restraint." Each of these cases is distinguishable from the case at bar, however, because of the degree and type of discretion conferred upon the licensing body.

> Section 10-8-330(h)(1) requires that "[t]he proposed activity will not *substantially* or *unnecessarily* interfere with traffic in the area contiguous to the route ...." Id. (emphasis added).

See supra.

Section 10-8-330(h)(2) requires that "[t]here are available at the time of the parade, public assembly or athletic event a *sufficient* number of peace officers to police and protect lawful participants in the activity ...." Id. (emphasis added).

Section 10-8-330(h)(3) requires "[t]he *concentration* of persons, animals, vehicles, or things at the assembly and disbanding areas and along the parade or athletic event route will not prevent *proper* fire and police protection or ambulance service ...." Id. (emphasis added).

See supra.

For example, in *Schnieder v. State,* the Court struck down a municipal ordinance which required the Chief of

Police to deny a permit to canvass or solicit door to door if he or she decides the speaker "is not of good character or ... is canvassing for a project not free from fraud." 308 U.S. 147, 158, 60 S.Ct. 146, 149, 84 L.Ed. 155 (1939). Similarly, in *Staub v. City of Baxley,* the Court invalidated a city ordinance that imposed no standards upon the mayor's decision to issue a permit to solicit memberships other than to "consider the character of the applicant, the nature of the business of the organization for which members are desired to be solicited, and its effects upon the general welfare of citizens of the City of Baxley." 355 U.S. 313, 316 n. 1, 78 S.Ct. 277, 279 n. 1, 2 L.Ed.2d 302 (1958); *see also* Shuttlesworth v. City of Birmingham, 394 U.S. 147, 149-50, 89 S.Ct. 935, 937, 22 L.Ed.2d 162 (1969) (invalidating statute which allowed commission to grant permits "unless in its judgment the public welfare, peace, safety, health, decency, good order, morals or convenience require that it be refused ....").

*7 In contrast to the obscure standards in the cases cited above, the provisions of § 10-8-330(h)(1)-(4), specify legitimate safety concerns in as precise a manner as such concerns can reasonably be articulated. Indeed, in terms of the type of "discretion" that it confers, § 10-8-330 is more analogous to prior restraint statutes that have been upheld in this circuit. *See, e.g.,* Graff v. City of Chicago, 9 F.3d 1309, 1318 (7th Cir.1993) (en banc) (plurality opinion), *cert. denied,* 511 U.S. 1085, 114 S.Ct. 1837, 128 L.Ed.2d 464 (1994) (holding that where there is "adequate and specific guidance ... as well as reasons for the applicant to anticipate the basis

for granting or denying a particular permit" a prior restraint licensing scheme may be upheld); *see also* MacDonald v. Chicago Park District, 132 F.3d 355, 362 (7th Cir.1997) (holding that, in light of Graff, plaintiff's claim that Park District ordinance accords Park District too much discretion in deciding to grant or deny a permit and in determining applicable fees, was not likely enough to succeed on merits to overcome balance of harms for preliminary injunction).

Finally, in Forsyth County v. Nationalist Movement, a case very similar to the one at bar, the Court invalidated an ordinance which required a permit for "parades, assemblies, demonstrations, road closings, and other uses of public property and roads by private organizations and groups of private persons for private purposes." 505 U.S. 123, 126, 112 S.Ct. 2395, 2399, 120 L.Ed.2d 101 (1992). The statute provided that every permit applicant " 'shall pay in advance for such permit ... a sum not more than $1,000.00 for each day" that the activity is held. Id. at 126, 112 S.Ct. at 2399. Furthermore, the statute authorized the county administrator to " 'adjust the amount to be paid in order to meet the expense incident to the administration of the Ordinance and to the maintenance of public order in the matter licensed." Id. at 126- 27, 112 S.Ct. at 2399. Testimony from a hearing held before the district court revealed the arbitrary and asystematic application of this fee assessment provision. Id. at 132-33, 112 S.Ct. at 2402-03. Based on this evidence and the "unbridled discretion" conferred upon the county administrator in implementing the statute, the Court held that the statute

was unconstitutional on its face. Id. In explaining its holding, the Court expressly noted the absence of: (1) any "articulated standards" in the ordinance, (2) reliance on "objective factors", and (2) explanation for or reviewability of the administrator's decision. Id. at 133, 112 S.Ct. at 2403.

In terms of the discretion it confers, § 10-8-330 is distinguishable from the ordinance invalidated in Forsyth. First, it is important to note that the decision to issue a permit does not rest with the Commissioner alone since, pursuant to § 10-8-330(h) & (m), the Commissioner is required to send copies of each application to various city agencies and to "investigate the facts set out in the application." Chicago Municipal Code § 10-8-330(h) & (m). In addition, as mentioned above, the statute contains articulated standards based on specific traffic and safety concerns. These standards are not overbroad because they are limited to factors pertaining to the specific event. Moreover, the statute requires the Commissioner to inform the applicant of the facts and conclusions that underlie his or her decision. *See* id. § 10-8- 330(I); Rules of Procedure for Contested Denials of Parade, Public Assembly or Athletic Event Permits ("Permit Rules"). Finally, the administrator's decision is subject to mayoral as well as judicial review. *See* Chicago Municipal Code § 10-8-330(I); Permit Rules §§ II-V. The court finds that the presence of these factors establish procedural safeguards sufficient to defeat the presumption of unconstitutionality of § 10-8-330 as a prior restraint.

> For example, instead of general, overbroad traffic concerns, the statue limits the Commissioners inquiry to the area contiguous to the route of the proposed event. *See* § 10-8-330.

Pursuant to § 10-8-330(m), the Commissioner, "in consultation with other city departments and agencies, shall promulgate rules and regulations to implement" certain provisions of the statute. Id. § 10-8- 330(m). The Permit Rules were promulgated by the Commissioner of the Department of Transportation in September 1996 and are still in effect. (Defendant City of Chicago's Memorandum in Response to Plaintiff's Motion for Preliminary Injunction Exhibit B).

B. *Content-based Restriction.*

*8 Plaintiff's argument that § 10-8-300 requires the commissioner to consider the content of the applicants' message in determining whether to permit the parade and his argument that consideration of the number of police which are required to "protect" or "police" the participants is improper are spun from the same thread. Indeed, both arguments find their source in the principle articulated in Forsyth. In that case, the Court found that, in addition to the fact that the challenged ordinance conferred unbridled discretion upon the county commissioner, the inquiry into the content of the speech that was necessitated by the fee assessment provision rendered the ordinance unconstitutional. The Court explained,

In order to assess accurately the cost of security for

> parade participants, the administrator " 'must necessarily examine the content of the message that is conveyed," Arkansas Writers' Project, Inc. v. Ragland, 481 U.S. 221, 230, 107 S.Ct. 1722, 1728, 95 L.Ed.2d 209 (1987), quoting FCC v. League of women Voters of Cal., 468 U.S. 364, 383, 104 S.Ct. 3106, 3119, 82 L.Ed.2d 278 (1984), estimate the response of others to that content, and judge the number of police necessary to meet that response. The fee assessed will depend on the administrator's measure of the amount of hostility likely to be created by the speech based on its content.

Forsyth, at 134, 112 S.Ct. at 2403.

Similarly, in order for the Commissioner to give force to subsection (2) of § 10-8-330, which provides, in relevant part, that there must be "a sufficient number of peace officers to police and protect lawful participants in the activity", he or she must necessarily consider the content of the activity.

The City contends that when read "in context"--that is, when read along with the surrounding provisions--it is clear that subsection (2) is not content- based. However, the context provided by the surrounding provisions reveals that § 10-8-330(h)(2) is superfluous. Section 10-8-330(h)(1) adequately addresses the City's interest in regulating traffic and § 10-8-330(h)(3) adequately provides for the provision of emergency service and police protection. Thus, § 10-8-330(h)(2) appears to serve no independent purpose other than to

allow the Commissioner to exercise his or her discretion based on the content of the proposed activity. Such an exercise is presumptively invalid under the First Amendment.

The City further argues that the court must consider the City's authoritative constructions of the Ordinance, including the City's implementation and interpretation of it. *See* Forsyth County v. Nationalist Movement, 505 U.S. at 131-32, 112 S.Ct. at 2402. In Forsyth, the Court considered the implementation of the challenged ordinance with respect to claims that the ordinance gave the administrator unfettered discretion over how much to charge for police protection or administrative time. Id. Here, however, the court has found that § 10-8-330 does not provide unfettered discretion. Furthermore, if, as the City claims, subsection (2) of the Ordinance is interpreted and implemented solely in relation to traffic concerns, the City's "narrowing construction" renders subsection (2) superfluous because, as stated above, subsections (1) and (3) adequately address traffic and safety concerns as well as police protection. Finally, the City's reliance on Stokes v. City of Madison, 930 F.2d 1163, 1169-70 (7th Cir.1991), is misplaced. In that case, the Seventh Circuit held that the implementation of the challenged ordinance was constitutional *because the city had never denied a sound amplification or Street Use Permit.* Here, it is undisputed that the City has denied parade permits and in fact denied a permit to plaintiff on at least two occasions.

See Ward v. Rock Against Racism, 491 U.S. at

795, 109 S.Ct. at 2756 ("[a]ny inadequacy on the face of the guideline would have been more than remedied by the city's narrowing construction").

*9 In light of Forsyth, and myriad precedent proscribing content-based regulations, this court finds that subsection (2) of § 10-8-330 is unconstitutional on its face.

C. *Prompt Judicial Review.*

Plaintiff contends that § 10-8-330(i) fails to provide for prompt judicial review in the event a parade permit is denied. Section 10-8-330 permits an applicant to contest the denial of his or her application by appealing to the mayor. Id. The decision of the mayor is then "subject to judicial review in accordance with applicable law." *See* Chicago Municipal Code § 10-8-330(i); Permit Rules §§ II-V. The Permit Rules establish a fourteen (14)-day period from the date of denial in which to file notice of intent to appeal an adverse decision at the Office of the Mayor's License Commission ("Commission"). Permit Rules § II. Upon receiving such notice the Commission will set a hearing to occur within seven (7) business days of the date of notice. Id. § III. The Commission is then required to issue a decision within three (3) business days of the date that the matter is taken under advisement. Id. § IV.

In addition, the Permit Rules provide for an expedited appeals process in the event that there are seventeen (17) business days or less between the date of the

permit denial and the desired event date. Id. § V. Under this scenario, the applicant must file written notice at the Commission within forty-eight (48) hours of the permit denial. Id. A hearing date will then be set within twenty-four (24) hours (or one business day) of receipt of notice of intent to appeal. Id. The hearing will occur within seven (7) business days of the date of notice and the Commission will issue a ruling within twenty-four (24) hours (or one business day) of the date that the matter is taken under advisement. Id.

In light of the foregoing procedure and, in particular, the expedited process set forth in the Permit Rules, and the applicant's ability to seek immediate judicial review, the court finds that § 10-8-330, and the accompanying Permit Rules, provide for an appeal procedure that contains constitutionally adequate safeguards.

D. *Burden on Appeal.*

Finally, plaintiff maintains that § 10-8-330 is unconstitutional because it fails to require the District to bear the burden of seeking judicial review of its decision to deny a permit. In Freedman v. Maryland, the Supreme Court established three mandatory procedural safeguards to ensure expeditious decisionmaking by the decisionmaking body: (1) any restraint prior to judicial review can be imposed only for a specified brief period during which the status quo must be maintained; (2) expeditious judicial review of that decision must be available; and (3) the censor must bear the burden of going to court to suppress the speech and must bear the

burden of proof once in court. 380 U.S. 51, 58-60, 85 S.Ct. 734, 738-40, 13 L.Ed.2d 649 (1965). The Court reasoned that, "[w]ithout these safeguards, it may prove too burdensome to seek review of the censor's determination." Id. at 56, 85 S.Ct. at 737.

*10 While the City correctly notes that this holding was narrowed in *FW/PBS, Inc. v. City of Dallas,* it is still binding on licensing schemes that pertain to private individuals engaged in noncommercial activity. 493 U.S. 215, 227-31, 110 S.Ct. 596, 606-07, 107 L.Ed.2d603 (1990)(distinguishing presumptively invalid direct censorship of particular expressive material from ministerial action of reviewing general qualifications of each applicant, and holding that the latter scheme need not impose a burden of going to court or of justifying the decision to suppress speech). *FW/PBS* involved a licensing scheme for the operation of "sexually oriented businesses ." Id. The Court determined that the scheme's failure to impose on the licensor the burden of going to court or of justifying the decision to suppress speech did not render the scheme unconstitutional because other safeguards inherent in the scheme served to protect First Amendment interests. Id. at 229, 110 S.Ct. at 606- 07. Specifically, the court noted that because "the city does not exercise discretion by passing judgment on the content of any protected speech" and the applicant has "every incentive" to challenge a denial in court since the license is a prerequisite to obtaining and maintaining a business, the First Amendment does not require that the scheme include the third Freedman safeguard. Id. at 229-30.

The City argues that, for the similar reasons, § 10-8-330 should be exempt from including the third Freedman safeguard. However, § 10-8-330 does not possess either characteristic that distinguished the licensing scheme in *FW/PBS* from that in Freedman. First, § 10-8-330 does not apply strictly to profit-seeking ventures and provides no inherent financial incentive to challenge the denial of a permit. Second, to the extent that § 10-8-330(h)(2) requires the Commissioner to consider the content of the protected activity in determining whether a sufficient number of peace officers are available to police and protect the lawful participants, it is unconstitutional. Moreover, the law of this circuit supports the conclusion that the speaker should not bear the burden of demonstrating his or her right to exercise First Amendment freedoms:

> *See supra* Part III.B.

We are hesitant to impose on municipalities the necessity of resorting to court injunctive procedure every time it is decided that a permit for use of public property should properly be denied. Nevertheless, in the sensitive area of prior restraint of freedom of expression this is a necessary due process requirement.

Collin v. Chicago Park Dist., 460 F.2d 746, 756 (7th Cir.1972). The court therefore finds that § 10-8-330 is constitutionally inadequate for want of language establishing that the government bears the burden of justifying its decision upon appeal.

In sum, the court grants plaintiff's motion for summary judgment with respect to his request for a declaratory judgment that § 10-8-330(h)(2) is an unconstitutional content-based restriction and that § 10-8-330(h) is constitutionally inadequate in that it fails to require the Commissioner to seek judicial review if a permit application is denied. The court denies declaratory relief with respect to plaintiff's remaining facial challenges to the ordinance and thus grants the City's motion for summary judgment with respect to those challenges.

IV Injunctive Relief

*11 In Count II of his Verified Complaint, plaintiff seeks a permanent injunction permanently prohibiting the enforcement of § 10-8-330. The standard for a permanent injunction is essentially the same as for a preliminary injunction except that in seeking a permanent injunction, MacDonald must prove actual success on the merits rather than likelihood of success on the merits. *See* Amoco Production Co. v. Village of Gambell, 480 U.S. 531,546, 107 S.Ct. 1396, 1404, 94 L.Ed.2d 542, n. 12 (1987); Plummer v. American Institute of Certified Public Accountants, 97 F.3d 220, 229 (7th Cir.1996). In light of the court's finding that subsections (h)(2) & (I) of § 10-8-330 are unconstitutional, plaintiff has proved actual success on the merits. Accordingly, to obtain injunctive relief, MacDonald must also demonstrate: (1) lack of an adequate remedy at law; (2) that the threatened injury to plaintiff outweighs the threatened harm the injunction would inflict on the City; and (3) that

granting the injunction will not harm the public interest. Plummer, 97 F.3d at 229.

Injunctive relief generally is proper to prevent the enforcement of state or local rules found to be unconstitutional. Schnell v. City of Chicago, 407 F.2d 1084, 1086 (7th Cir.1969) ("injunctive relief is a proper remedy if the alleged unconstitutional deprivation of rights is established"); *see also* Moody v. Cronin, 484 F.Supp. 270 (C.D.Ill.1979).

A. Adequacy of Remedy at Law and Threat of "Irreparable Harm."

In general, an "adequate remedy at law" assumes that monetary damages would be sufficient to compensate for the injury suffered. However, in light of the immeasurable value placed on First Amendment freedoms, it is clear that no monetary payment would suffice to compensate plaintiff. Moreover, the Supreme Court has held that "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." Elrod v. Burns, 427 U.S. 347, 373, 96 S.Ct. 2673, 49 L.Ed.2d 547 (1976).

In light of the foregoing, the court finds that plaintiff will suffer irreparable injury if injunctive relief is not granted and that plaintiff has no adequate remedy at law.

B. Balancing of Harms

The balancing of harms entails a "sliding scale" analysis which considers the likelihood of the movant's success on the merits and the harm the movant will suffer if injunctive relief is denied. Storck USA L.P v. Farley Candy Co., 14 F.3d 311, 314 (7th Cir.1994); Kowalski v. Chicago Tribunc Co., 854 F.2d 168 (7th Cir.1988). The court has determined earlier in this memorandum opinion that plaintiff has succeeded on the merits of his prior restraint challenges. The court has further determined that, in light of the holding in Elrod, and the serious protection accorded First Amendment freedoms, plaintiff will suffer irreparable injury if he is unable to exercise his constitutional guarantee of freedom of expression and freedom of assembly. Indeed, the First Amendment has been characterized as " ... the matrix, the indispensable condition, of nearly every other form of freedom." Palko v. Connecticut, 302 U.S. 319, 327, 58 S.Ct. 149, 82 L.Ed. 288 (1937) (Cardozo, J.), *overruled on other grounds by* Benton v. Maryland, 395 U.S. 784, 89 S.Ct. 2056, 23 L.Ed.2d 707 (1969). Furthermore, traditional public fora, such as parks and streets, " 'have immemorially been held in trust for the use of the public, and time out of mind, have been used for purposes of assembly, communicating thoughts between citizens, and discussing public questions." ' Perry Educ. Ass'n v. Perry Local Educator's Ass'n, 460 U.S. 37, 45, 103 S.Ct. 948, 74 L.Ed.2d 794 (1983) (quoting Hague v. CIO, 307 U.S. 496, 515, 59 S.Ct. 954, 83 L.Ed. 1423 (1939)).

*12 There is no question that absent a ruling in

plaintiff's favor by the court, he will be deprived of certain rights under the First Amendment in light of the unconstitutional provisions of § 10-8-330. The City, on the other hand, should suffer no injury if an injunction should issue requiring it to modify the terms of § 10-8-330 to achieve constitutional compliance. Accordingly, upon balancing the harms that are inherent in granting or denying preliminary relief, the court finds that the scales weigh in favor of plaintiff.

C. Public Interest

Because of the bilateral nature of the exercise of free speech--that is, the right to speak and the right to receive the message--the public interest is intimately affected by any abridgement of free speech. *See* Bose Corp. v. Consumer's Union, 466 U.S. 485, 503-04, 104 S.Ct. 1949, 1961, 80 L.Ed.2d 502 (1984) ("[F]reedom to speak one's mind is not only an aspect of individual liberty--and thus a good unto itself--but also is essential to the common quest for truth and the vitality of society as a whole."). The First Amendment "reflects a 'profound national commitment' to the principle that 'debate on public issues should be uninhibited, robust, and wide-open' ...." Boos v. Barry, 485 U.S. 312, 318, 108 S.Ct. 1157, 1162, 99 L.Ed.2d 333 (1988) (quoting New York Times Co. v. Sullivan, 376 U.S. 254, 270, 84 S.Ct. 710, 721, 11 L.Ed.2d 686 (1964)). Indeed, the "public has an interest in encouraging the free flow of information and ideas" and in "the vindication of an individual's constitutional rights." O'Brien v. Town of Caledonia, 748 F.2d 403, 408 (7th Cir.1984). Thus, this court may not

shirk its responsibility to remedy an unconstitutional prior restraint on freedom of expression that threatens the public interest. Rather, this court must promote the public interest by vigorously protecting constitutional guarantees. It is clear therefore that this matter weighs in favor of plaintiff.

Conclusion

For the foregoing reasons, plaintiff's motion for summary judgment is granted in part, in that this court enters declaratory judgment in favor of plaintiff that § 10-8-330(h)(2) & (i) are unconstitutional. This court further enters a permanent injunction prohibiting the City of Chicago from enforcing these provisions of the Ordinance. Plaintiff's motion with respect to the constitutionality of the remaining provisions of § 10-8-330 is denied, and the City of Chicago's motion with respect to the constitutionality of those provisions is accordingly granted.

JUDGMENT IN A CIVIL CASE

[ ] Jury Verdict. This action came before the Court for a trial by jury. The issues have been tried and the jury rendered its verdict.

Decision by Court. This action came to trial or hearing before the Court. The issues have been tried or heard and a decision has been rendered.

IT IS HEREBY ORDERED AND ADJUDGED that the Plaintiff's Motion for Summary Judgment is granted in part, in that this Court enters declaratory judgment in

favor of the plaintiff, Robert MacDonald, that § 10-8-330(h)(2) & (i) of the Code of Ordinances of the City of Chicago are unconstitutional. The City of Chicago is hereby enjoined from enforcing these provisions of the Ordinance.

*13 Plaintiff's Motion with respect to constitutionality of the remaining provisions of § 10-8-330 is denied. The City of Chicago's Motion with respect to the constitutionality of those provisions is granted.

This Case is closed.

United States District Court, N.D. Illinois.

Robert MACDONALD, Plaintiff,
v.
CITY OF CHICAGO, Defendant.

No. 97 C 5266.

Oct. 21, 1998.

MEMORANDUM OPINION AND ORDER

COAR, J.

*1 Before this court, the City of Chicago's (the "City") Motion to Alter Judgment. The City makes two basic arguments in support of its motion to alter the court's September 23, 1998, Memorandum Opinion and Order. First, the City argues that, by striking down the content-based portion of the City's parade permitting ordinance, the court transformed the ordinance into a content-neutral statute or a time, place and manner restriction. The City argues that because the procedural safeguards dictated by the Supreme Court in Freedman apply only to prior restraints and not to time, place and manner restrictions, the court should amend the portion of its ruling requiring that the City bear the burden of appeal when a permit is denied. Alternatively, the City requests that the court stay enforcement of its ruling enjoining the City from enforcing Section 10-8-330(i) during the

pendency of an appeal.

The City's second argument in support of its motion to alter judgment is predicated on standing. The City contends that, because the court upheld other subsections of § 10-8-330(h), and because MacDonald's parade permit was denied under those subsections as well as the subsection the court struck down, his injuries were not redressable by the court. In other words, the City claims that under the constitutionally valid subsections, plaintiff still would have been denied a permit and therefore his injury is not traceable to the invalid portion of the ordinance.

For the reasons set forth below, the City's motion to alter judgment is denied and its motion to stay enforcement of the injunction against implementing § 10- 8-330(i) pending appeal is granted.

I. Application Of The Freedman Safeguards To The Now Content-Neutral Ordinance.

The City's first argument is premised on its assertion that a content-neutral ordinance is not subject to the procedural safeguards set forth in Freedman v. Maryland, 380 U.S. 51, 85 S.Ct. 734, 13 L.Ed.2d 649 (1965). Supreme Court precedent does not support this contention. In FW/PBS v. City of Dallas, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990), the Supreme Court expressly stated, "[b]ecause we conclude that the city's licensing scheme lacks adequate procedural

safeguards, we do not reach the issue decided by the Court of Appeals whether the ordinance is properly viewed as a content-neutral time, place and manner restriction ..." This precedent establishes that a review of the procedural safeguards in a licensing scheme should be undertaken *regardless* of whether the ordinance is content-neutral. While the FW/PBS Court dispensed with the requirement that the licensor bear the burden of going to court to justify a license denial, it did so in the context of *business* licensing schemes, reasoning that, in this context, an applicant has "every incentive" to challenge a denial in court since the license is a prerequisite to maintaining a business. Id. at 229-30. As noted in this court's Memorandum Opinion and Order, those applying for parade permits under 10-8-330 have no inherent financial incentive to challenge the denial of a permit.

In Graff v. City of Chicago, 9 F.3d 1309 (7th Cir.1993), a majority of the court declined to impose the third Freedman prong where the City denied a permit application for a newsstand. The court relied on the reasoning in FW/PBS, namely that the ordinance did not give the commissioner unfettered discretion and that a newsstand is "as much a business as an adult book store," providing an incentive for the applicant to pursue the license denial through the court. 9 F.3d at 1324, FN 11.

*2 The court finds that Collin v. Chicago Park District, 460 F.2d 746 (7th Cir.1976), is controlling in this case. While the City urges the court to rely instead on Graff, the facts in Collin are more analogous to this case than in Graff. In Graff, the court examined the constitutionality of a licensing scheme for newsstands, an ongoing, commercial activity. Indeed, the plurality in Graff held that operating a newsstand was mere conduct and not expressive activity. In Collin, as here, the ordinance at issue relates to the issuance of a permit to hold a public meeting. That is, pure speech is involved. The Collin court recognized the implication of requiring the City to bear the burden of appeal, stating, "[w]e are hesitant to impose on municipalities the necessity of resorting to court injunctive procedure every time it is decided that a permit for use of public property should properly be denied. Nevertheless, in the sensitive area of prior restraint of freedom of expression this is a necessary due process procedure." 460 F.2d at 756.

The City also places great reliance on Cox v. New Hampshire, 312 U.S. 569, 61 S.Ct. 762, 85 L.Ed. 1049 (1941), which upheld the constitutionality of a statute that prohibited parades or processions upon any public street or way without first obtaining a special license from the town selectman or a licensing committee. In that case, the Court reaffirmed a municipality's right to regulate the use of the streets, even when the proposed use is for a constitutionally protected purpose such as speech or assembly. The City argues that, because the

licensing statute at issue in Cox was merely a time, place, and manner restriction, the Court did not require the imposition of any procedural safeguards. The City fails to acknowledge, however, that Cox was decided well before the procedural safeguards were set forth in Freedman. Furthermore, as noted by the dissent in Graff, "Lakewood [486 U.S. 750, 108 S.Ct. 2138], FW/PBS and a long series of earlier decisions review licensing schemes directed at First Amendment activity as prior restraints on speech that are valid only if the licensor's power is checked by procedural safeguards." 9 F.3d at 1336 (Cummings, dissenting).

Finally, taken to its logical conclusion, the City's argument leads to a finding that an ordinance is only a prior restraint if it is content-based or provides the licensor with unfettered discretion. An ordinance that is content- based or provides unfettered discretion is unconstitutional. Accordingly, the City essentially contends that a prior restraint can never be constitutional because only content-based ordinances are classified as prior restraints. However, prior restraints are constitutionally permitted so long as "procedural safeguards tightly control the discretion of the administrative authority and subject it to rapid judicial review." Stokes v. City of Madison, 930 F.2d 1163 (7th Cir.1991). In Stokes, the court analyzed the parade ordinance at issue under a prior restraint analysis. In upholding the ordinance because the city had never denied a permit application, the court noted a third situation in which a prior restraint was

permissible, namely, "when a restraint is implemented in a constitutional manner." Indeed, the court noted that, "[w]ere it not for the generous practice of the city authorities, [the ordinance] might not survive constitutional scrutiny." Accordingly, the City's argument that a prior restraint must always be unconstitutional in order to constitute a prior restraint is misguided because courts can and do uphold prior restraints under the proper circumstances.

> In Chesapeake B & M, Inc. v. Harford County, 58 F.3d 1005, 1012, n. 7 (4th Cir.1995) (en banc), the majority rejected the dissent's assertion that procedural safeguards were required only when the ordinance provided unbridled discretion in the duration or application of decision- making criteria, holding that, "the dissent's approach would effectively render the safeguards meaningless: they would be required only for those ordinances that are already invalid." Similarly, the City would have the court apply the prior restraint safeguards only when the ordinance is already unconstitutionally content-based.

The first exception justifying a narrowly drawn prior restraint is a powerful overriding interest such as national security matters, obscenity, incitements to violence or overthrow of an orderly government. The

second circumstance permits prior restraints where the procedural safeguards are in place.

*3 The court recognizes, however, that several courts agree with the City's definition of a prior restraint. These courts hold that a content-neutral, time, place, and manner restriction is not subject to the procedural safeguards required for a prior restraint. Graff, 9 F.3d 1309 (ordinance setting out guidelines by which city officials would decide whether to grant permission to construct a newsstand did not constitute a prior restraint); *see also Gasparo v. City of New York*,--F. Supp.--, 1998 WL 465903 (May 28, 1998) (explicit mechanism for judicial review "may not be necessary where, as here, an ordinance is content-neutral, the licensor's discretion is not 'unfettered,' the statute requires that the request for a license be acted on promptly, and the administrative determination is based on criteria that are within the administrator's normal expertise"); Progressive Labor Party v.. Lloyd, 487 F.Supp. 1054 (D.Mass.1980) ("it is clear that there is no requirement that a facially-neutral ordinance must provide by its terms for expedited review"). Further, as a practical matter, courts have required procedural safeguards for prior restraints mainly where the statutes or conduct were, in fact, content- based. In Freedman, the statute at issue provided criminal penalties for showing a movie without prior approval by a board of censors; FW/PBS involved a licensing scheme for sexually oriented businesses; in *Southeastern*

Promotions, plaintiff was denied permission to use a theater for a musical production because it was determined that the production was not "clean and healthful and culturally uplifting"; in Collin, the Park District relied on the plaintiff's past history of violence and the possibility of there being hostile audience members causing violence (plaintiff was leader of Nazi party) when it failed to issue a permit; and Chesapeake B & M involved an adult bookstore licensing law.

The court nonetheless relies on the definition of prior restraint repeatedly promulgated by the Supreme Court. *See* FW/PBS, 493 U.S. 215, 110 S.Ct. 596, 107 L.Ed.2d 603 (1990); Shuttlesworth v. Birmingham, 394 U.S. 147, 150-51, 89 S.Ct. 935, 22 L.Ed.2d 162 (1969) (the government engages in prior restraint of speech when it requires citizens or businesses to obtain permission before making protected speech); Niemtoko v. Maryland, 340 U.S. 268, 71 S.Ct. 325, 95 L.Ed. 267 (1951); Near v. Minnesota, 283 U.S. 697, 51 S.Ct. 625, 75 L.Ed. 1357 (1931); *accord* Stokes, 930 F.2d 1163 (7th Cir.1991) (applying prior restraint analysis to parade ordinance). Therefore, because the court finds FW/PBS and Collin are controlling in this case, the City's motion to alter the judgment with respect to § 10-8-330(i) is denied.

II. Standing

The City's argument that plaintiff lost standing to attack the parade ordinance based on this court's ruling that

certain subsections of the ordinance are constitutional is without merit. As stated in the Memorandum Opinion and Order, plaintiff's standing was determined at the time he filed his lawsuit. The City relies on Harp Advertising Illinois, Inc. v. Village of Chicago Ridge, 9 F.3d 1290 (7th Cir.1993), to support its argument that, because plaintiff's parade permit was denied under subsections found to be constitutional, he would not have been granted a permit in any event and therefore cannot establish redressability. The City's reliance is misguided. In Harp, the plaintiff did not have standing to challenge an ordinance regulating billboards, because even if the challenged ordinance was declared unconstitutional, another separate ordinance prohibited plaintiff from erecting the billboard. The key to that decision was the fact that the plaintiff had not challenged the other ordinance. Here, plaintiff has challenged the entire ordinance. The fact that this court ruled against MacDonald on some of those subsections, and did not invalidate the ordinance in its entirety, does not deprive MacDonald standing. Again, MacDonald clearly had standing at the time he initially challenged the ordinance, this court's Memorandum Opinion and Order does not change that.

III. The City's Motion For Stay Pending Appeal.

*4 The City has requested a stay of the injunction prohibiting it from enforcing Section 10-8-330(i) of the ordinance based on the court's finding that this subsection is unconstitutional for failure to provide the

Freedman procedural safeguards. Fed.R.Civ.P. 62(c) provides that the court may suspend enforcement of an injunction during the pendency of an appeal. In determining whether to grant a stay, the court may consider the following factors: (1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies. Hilton v. Braunskill, 481 U.S. 770, 776, 107 S.Ct. 2113, 2119, 95 L.Ed.2d 724 (1987).

Given the conflicting case law regarding the application of procedural safeguards to content-neutral ordinances and the practical application of prior restraint analysis to content-based ordinances, the court finds that the City has made a sufficient showing of likelihood of success on the merits with respect to its first argument. In addition, the City will be harmed absent a stay in the sense that it will be required to seek judicial review every time it denies a parade permit. The City further points out that because the ordinance permits applications for parades within seven days of a proposed event, the City will have to seek immediate review to prevent the parade from proceeding. By the time a judicial determination is made, the Police Department may not have sufficient time to plan for the parade.

The court also agrees that other parties will not be harmed by a stay. MacDonald does not have any parade

applications pending and accordingly would not have to bear the burden of judicial review. Finally, it is arguably in the public interest to grant the stay to prevent inadequate police protection in the event a parade application is received late and a judicial determination is not received in time to plan for and provide effective services for the parade. If, however, this court's order is affirmed on appeal, the City should consider amending the ordinance to give it more time to seek judicial review prior to the date of the planned event. While it is a close call, the court believes the balance weighs in favor of granting the stay.

Conclusion

For the foregoing reasons, the City's motion to alter judgment is denied and its motion for stay with respect to the injunction against enforcement of § 10- 8-330(i) is granted.

END OF DOCUMENT

United States District Court, N.D. Illinois, Eastern Division.

Robert MACDONALD, Plaintiff,
v.
CITY OF CHICAGO, an Illinois municipal corporation, Defendant.

No. 97 C 5266.

Feb. 22, 1999.

MEMORANDUM OPINION AND ORDER

COAR, District J.

*1 Before this court is the City of Chicago's (the "City") Emergency Motion to Vacate Injunction. Since the date this court entered final judgment on the City of Chicago's Municipal parade ordinance, Section 10-8-330, *et al.,* the Chicago City Council has amended the statute, specifically Sections 10-8- 330(h)(2), (i), and (1). The City argues that these amendments now make the ordinance a permissible content-neutral time, place and manner restriction, and thus the procedural requirements of *Freedman v. Maryland* do not apply. The City also argues that the court may vacate the injunction, for the circumstances under which the injunction was issued have significantly changed. Personnel shortages may result if the city cannot

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consider the number of peace officers necessary for an event before issuing the permit, and the City anticipates a large number of applications for parade permits in early 1999. After careful consideration of the City's arguments, the court has decided to DENY the City's motion.

I. Background

This motion stems from a lawsuit originally filed by the plaintiff Robert MacDonald ("plaintiff' or MacDonald") in July of 1997. The plaintiff facially challenged the constitutionality of the City of Chicago's Municipal parade ordinance, Section 10-8-330 *et al.,* (the "Ordinance") and sought an injunction to prevent the City from enforcing the ordinance. On September 23, 1998, this court entered a Memorandum Opinion and Order that ruled that Section 10-8- 330(h)(2) and (i) were unconstitutional, for Section (h)(2) impermissibly allowed the Commissioner of Transportation to consider the content of the proposed speech in issuing a parade permit, and Section (i) did not provide adequate procedural safeguards for judicial review required under Freedman v. Maryland, 380 U.S. 51 (1965). The court permanently enjoined the City from enforcing Sections (h)(2) and (i) of the ordinance.

In response to the permanent injunction, the City filed a Motion to Alter Judgment and argued that the court had transformed the ordinance into a content-neutral time, place, manner restriction by striking down the content- based portion of the ordinance. Since the

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ordinance was now content-neutral, the procedural safeguard requirements of *Freedman* no longer applied. The City requested in the alternative that the court stay the enforcement of the injunction on Section (i) pending an appeal. The court denied the City's motion, but granted the City the stay.

Now we are at the present situation. In response to this court's rulings, the Chicago City Council amended Section 10-8-330 in November of 1998. In particular, Section (h)(2) was amended as follows:

h. The commission of transportation shall investigate the facts set out in the application and shall issue a permit when he or she finds that: ...

(2) There are available at the time of the parade, public assembly or athletic event a sufficient number of peace officers to police and protect lawful participants in the activity *and non-participants from traffic related hazards in light of the other demands for policy protection at the time of the proposed event or activity.*

*2 Section 10-8-330(h) (as amended; new language underlined).

Section (i) was amended as well:

The commissioner of transportation shall act upon the application for a parade or public assembly permit within two *business* days after the filing thereof *or, if a*

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lottery is held pursuant to paragraph (g) of this section, within two business days of the lottery. If the commissioner of transportation disapproves the application, the commissioner shall *provide by facsimile transmission or telephonically and by* mail *directed* to the applicant within two *business* days after the date upon which the application was filed, [a] notice of his or her action, stating the facts and conclusions which are the basis for his or her denial of the permit. Any applicant who believes that his or her application is wrongfully disapproved may appeal to the mayor the propriety of said action *by notifying the office of the Mayor's License Commission of the intent to appeal. If no appeal is filed within two business days, of the date notice of the Commissioner's decision is given, that decision shall be deemed final.* Upon the filing of such appeal, the [mayor] *Mayor's Licence Commission* shall cause a hearing to be held *within three business days* and based upon the evidence contained in the record of such hearing, either affirm or reverse the decision of the commissioner of transportation. [The action] *Any final decision* of the [mayor] *Commissioner of Transportation or the Mayor's License Commission* shall be subject to judicial review in accordance with applicable law. In the event that the commissioner of transportation fails to act within two *business* days after the date upon which the application was filed, *or the Mayor's License Commission fails to act within two business days of the conclusion of a hearing held under the section,* said application for a permit shall be deemed approved and the permit deemed granted in conformance with the

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application. Section 10- 8-330(i) (as amended; new language underlined, removed language in brackets).

After these amendments were made, the City filed a Notice of Appeal to the Seventh Circuit. It then filed an Emergency Motion to Vacate Injunction with this court, arguing that the amendments make the ordinance a valid time, place, manner restriction. Relying upon Cox v. New Hampshire, 312 U.S. 569 (1941), and Graff v. City of Chicago, 9 F.3d 1309 (7th Cir.1993), the City argues that the procedural requirements of *Freedman* do not apply to a content- neutral time, place, manner restriction and thus the City is not required to seek judicial review for each denial of a parade permit under the ordinance. The City also argues that the injunction must be lifted before the appeal is ruled upon, for the City anticipates a large number of applications for permits to occur at the beginning of this year and under the injunction, the City risks not being able to anticipate the necessary number of personnel for each parade. Therefore, public safety could be placed in jeopardy if a parade occurs and the City has not been able to adequately predict the need for peace officers.

*3 Below, the court first examines whether the district court has jurisdiction to hear the City's motion, and then each of the City's arguments will be addressed in turn.

II. Jurisdiction

The plaintiff argues that this court does not have jurisdiction to hear the City's emergency motion since

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the City previously filed a Notice of Appeal and thus the district court has lost jurisdiction over the case to the Court of Appeals. (Pl's Resp., pp. 1-2). The plaintiff's argument is incorrect. Under Rule 60(b)(5), a party may seek relief froma final judgment if "it is no longer equitable that the judgment should have prospective application." Fed.R.Civ.Proc. 60(b)(5). Therefore, parties may file Fed.R.Civ.Proc. 60(b) motions in the district court while an appeal is pending. Brown v. United States, 976 F.2d 1104, 1110-1111 (7th Cir.1992).

III. Modification of a Permanent Injunction

A change or modification of a permanent injunction is extraordinary relief and requires a showing of extraordinary circumstances, Protectoseal Co. v. Barancik, 23 F.3d 1184, 1186 (7th Cir.1994); Money Store, Inc. v. Harriscorp Finance, Inc., 885 F.2d 369, 372 (7th Cir.1989); Ben Sager Chemicals Int'l v. E. Targosz & Co., 560 F.2d 805, 808 (7th Cir.1977); Securities and Exchange Commission v. Advance Growth Capital Corp., 539 F.2d 649, 652 (7th Cir.1976); or a showing or a grievous wrong evoked by new and unforeseen conditions. Securities and Exchange Commission, 539 F.2d at 652. The burden is on the moving party to present clear evidence that there has been a significant change in conditions and that continuing enforcement of the injunction would be inequitable. Duran v. Elrod, 713 F.2d 292, 296 (7th Cir.1983); DeFilippes v. United States, 567 F.2d 341, 343-344 (7th Cir.1976) (citing United States v. Swift & Co., 286 U.S. 106, 119 (1932)). The standard for modification is based not only on hardship to the enjoined party, but also on whether there remains

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a need to continue the injunction. In other words, the question to be asked is have the purposes of the injunction been fulfilled. United States v. Chicago, 663 F.2d 1354, 1360 (7th Cir.1981).

The City argues that the amendments to the statute made since this court's ruling on the Motion to Alter Judgment have eliminated the constitutional concerns of this court and thus make the injunction unnecessary. In particular, the City argues that the amendments to Sections (h)(2) and (i) now make it clear that the ordinance is content-neutral and thus eliminated is the need for the procedural safeguards of Freedman v. State of Maryland, 380 U.S. 51 (1965). (Dft's Reply, pp. 3-5). To support their argument, the City cites Cox v. New Hampshire, 312 U.S. 569 (1941) and Graff v. City of Chicago, 9 F.3d 1309 (7th Cir.1993), stating that a content neutral statute that does not vest the government with unfettered discretion does not trigger the procedural requirements of *Freedman*. (Dft's Motion, p. 4; Dft's Reply, p. 5). The City then argues that if the court does not modify the injunction, personnel shortages could possibly occur that could endanger the safety of the public, especially considering that the City anticipates that they will receive a large number of applications for parade permits in early January of 1999. (Dft's Motion., p. 4).

*4 The arguments presented by the City in this emergency motion are extremely similar to their arguments in their Motion to Alter Judgment. In the Memorandum Opinion and Order on that motion, this

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court found that the precedent of FW/PBS, Inc. v. City of Dallas, 493 U.S. 215 (1990), established that a review of procedural safeguards in a licensing scheme should be undertaken regardless of whether an ordinance was content-neutral. (Mem. Op. and Order, p. 2). The court disagreed with the City's reliance on *Graff* and differentiated the present case. While *Graff* examined a commercial licensing scheme that applied to mere conduct, the present case is more similar to Collin v. Chicago Park District, 460 F.2d 746 (7th Cir.1972), which examined a permit that applied to pure speech, and thus procedural safeguards were necessary to protect the freedom of expression. This court made clear that, while it recognized that several courts agree with the City on the definition of prior restraint as an ordinance that is content-based or provides unfettered discretion, *see* Gasparo v. City of New York, 1998 WL 465903 (May 28, 1998); Progressive Labor Party v. Lloyd, 487 F.Supp. 1054 (D.Mass.1980), this court relies upon the definition provided by the Supreme Court, i.e. that prior restraints are not unconstitutional per se, but that they come to the court with a heavy presumption against constitutional validity. *See FW/PBS;* Shuttlesworth v. Birmingham, 394 U.S. 147, 150-151, (1969); Niemtoko v. Maryland, 340 U.S. 268 (1951); Near v. Minnesota, 283 U.S. 697 (1931). Therefore, a prior restraint, even if it is content-neutral, must be examined to see if it has adequate procedural safeguards. *FW/PBS,* at 225-226 (1990).

The City also does not meet the burden of a Rule

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60(b)(5) motion, in that they do not show a significant change in conditions that creates such extraordinary circumstances that the continual enforcement of the injunction would be inequitable. The City asserts that there could possibly be personnel shortages and they anticipate an increase in applications of parade permits at the beginning of the year. However, they do not demonstrate how these concerns and conditions are any different than when the original injunction was ordered or even since their Motion to Alter Judgment was denied. The City does not even present any evidence to support their bald assertion that they "anticipate" an increase in applications.

Granted, one could argue that the amendments to the statute are in and of themselves a change in circumstances. However, the changes made to Section (h)(2) do not address the court's concern that the section allows the Commissioner to exercise his or her discretion based on the content of the proposed activity. While language pertaining to traffic hazards has been added, the language of the provision still forces the Commissioner to consider the content of the activity in order to assess the need for law enforcement. See Forsyth County v. Nationalist Movement, 505 U.S. 123, 134 (1992). The only difference after the amendment is now the Commissioner will compare the need to other events occurring in the area at the time. However, these "other demands" could include such events as counter-protests, thus forcing the examination of the content of the original speech.

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*5 Finally, pertaining to Section (i) of the ordinance, it is unnecessary to vacate the injunction, for this court stayed the injunction prohibiting enforcement of Section (i) in its Memorandum Opinion and Order on the City's Motion to Alter Judgment. Therefore, there is no extraordinary circumstance or grievous wrong to be avoided that would require the injunction to be vacated on Section (i) since the injunction is presently not being enforced on this section.

Conclusion

CG

For the foregoing reasons, the defendant City of Chicago's Emergency Motion to Vacate Injunction is DENIED.

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ORDINANCE

BE IT ORDAINED BY THE CITY COUNCIL OF THE CITY OF CHICAGO:

SECTION I. Section 10-8-330 of the Municipal Code of Chicago is hereby amended by deleting the language bracketed and inserting the language underscored, as follows:

10-8-330 Parade, public assembly or athletic event.

a. The following terms are defined for the purposes of this chapter as follows:

(I)"Parade" means any march, procession or other similar activity consisting of persons, animals, vehicles or things, or combination thereof, upon any public street, sidewalk, alley or other public place, which does not comply with normal and usual traffic regulations or controls.

(2)"Public assembly" means a company of persons which is reasonably anticipated to obstruct the normal flow of traffic upon the public way and that is collected together in one place.

(3)" Athletic event" means any event involving the conduct of exercises, sports or games which is reasonably anticipated to obstruct the normal flow of traffic upon the public way.

(4) "Business days" means those days in which municipal offices are open for conducting city business and does not include Saturdays, Sundays or such Holidays as are listed in Section 2-152-090.

b. No parade, public assembly or athletic event is permitted on any portion of the public way of the city of Chicago unless a permit allowing such activity has been obtained from the department of transportation.

c. A person, partnership, voluntary association, or other organization seeking to obtain a parade or public assembly permit shall file an application with the commissioner of transportation in the same calendar year as, and not less than seven business days before, the date for which the parade or public assembly is proposed, unless the requested permit is for a parade or public assembly to be held in January, in which case the application must be filed seven business days before the date for which the parade or public assembly is requested.

d. A person, partnership, voluntary association or other organization seeking to obtain an athletic event permit shall file an application with the commissioner of transportation in the same calendar year as, and not less than 45 days before, the date for which the athletic event is requested, unless the requested permit is for an event to be held in January or February, in which case the application must be filed 45 days before the date for which the athletic event is requested.

e. The application for a parade, public assembly or athletic event permit shall contain the following information, which must be updated by the applicant as circumstances change:

(1) The name, address, and daytime telephone number of the person signing the application;

(2) The name, address, [and] day-time telephone number, pager number- if applicable, and fax number if available, of the authorized and responsible leaders of the organization conducting the parade, public assembly or athletic event;

(3) The date of the proposed parade, public assembly or athletic event and the hours that it will commence and terminate;

(4) The location and exact street address of the assembly and disbanding area and the time when the parade, public assembly or athletic event will begin to assemble and disband;

(5) The approximate number of persons to participate in the parade, public assembly or athletic event and the basis on which this estimate is made; [and]

(6) The route along which the parade, public assembly or athletic event will proceed,[and] the sidewalks or lanes of traffic it will occupy, and the approximate number and types of vehicles anticipated to participate; and

(7) A list identifying the type and number of all animals the applicant intends to have at the parade, public assembly or athletic event; a health certificate for each animal to be used; the name of the attending local veterinarian who shall provide care for any sick or injured animals; and a copy of the handler's Federal Exhibitor's license for any animal identified in the Illinois Dangerous Animal Act.

In order to protect the health and safety of the public employees of the Commission on Animal Care

and Control are authorized to inspect animals prior to their use in activities upon the public way and to prohibit the use of animals found to be diseased, unhealthy or which pose a danger to public health and safety.

The application for a parade, public assembly or athletic event permit shall be accompanied by a nonrefundable processing fee of $35.00.

f. The commissioner of transportation, where good and compelling causes are shown therefor, may consider any application for a parade or public assembly permit which is filed less than seven business days before the date such parade or public assembly is proposed to be conducted.

g. Except as otherwise provided in this subsection, all applications for any permit filed hereunder shall be processed on a first-in-time basis. During the first two business days of each calendar year, the commissioner of transportation shall accept all applications for a parade or public assembly permit filed hereunder without giving priority to applications filed first in time. Any conflict between or among two or more such applications filed during that period for the same day or for overlapping routes shall be resolved by a lottery to be conducted by the commissioner.

The commissioner of transportation shall notify each such applicant in writing of the existence of the conflict and of the date, place and time of the lottery . Within seven days after the lottery, the applicants not chosen may submit alternative preferences to the commissioner. Any conflicts arising among the

alternative preferences shall be resolved in accordance with the lottery procedures set forth herein.

Applications for a parade or public assembly permit received during the first two business days of the calendar year shall be given priority over applications received thereafter.

h. The commissioner of transportation shall investigate the facts set out in the application and shall issue a permit when he or she finds that:

(1) The proposed activity will not substantially or unnecessarily interfere with traffic in the area contiguous to the [route] activity or that if the activity will substantially interfere with such traffic, that there are available at the time of the proposed activity sufficient city resources to mitigate the disruption.

(2) There are available at the time of the parade, public assembly or athletic event a sufficient number of peace officers to police and protect lawful participants in the activity and non-participants from traffic related hazards in light of the other demands for police protection at the time of the proposed event or activity.

(3) The concentration of persons, animals, vehicles, or things at the assembly and disbanding areas and along the parade or athletic event route will not prevent proper fire and police protection or ambulance service;

(4) The event is not being conducted for an unlawful purpose;

(5) An applicant for an athletic event permit has

complied with subsection (j) herein; [and]

(6) If the application is for an athletic event for which fees will be charged for participation in the event, the proposed athletic event will be in the best interest of the city in light of (i) the apparent ability of the applicant to comply with the requirements of this section, and (ii) the willingness and financial ability of the applicant to conduct the event in a manner appropriate to the type of the event, and to pay any prizes that the applicant has advertised or is likely to advertise. In making a determination under this paragraph (6), the commissioner may consider the experience of the applicant in conducting the same or similar events, and may require additional information from the applicant with respect to the proposed event and the applicant's financial situation[ ];

(7) The proposed activity will not interfere with the use of the requested area by another party to whom a valid permit has been issued for the same area or route; and

(8) The application contains sufficient information about the proposed route and crowd estimate to enable the commission to evaluate the proposed event under this section.

i. The commissioner of transportation shall act upon the application for a parade or public assembly permit within two business days after the filing thereof or if a lottery is held pursuant to paragraph (g) of this section within two business days of the lottery. If the commissioner of transportation disapproves the application, the commissioner shall provide by facsimile

transmission or telephonically and by mail directed to the applicant within two business days after the date upon which the application was filed, [a] notice of his or her action, stating the facts and conclusions which are the basis for his or her denial of the permit. Any applicant who believes that his or her application is wrongfully disapproved may appeal to the mayor the propriety of said action by notifying the office of the Mayor's License Commission of the intent to appeal. If no appeal is filed within two business days of the date notice of the Commissioner's decision is given, that decision shall be deemed final. Upon the filing of such appeal, the [mayor] Mayor's License Commission shall cause a hearing to beheld within three business days and based upon the evidence contained in the record of such hearing, either affirm or reverse the decision of the commissioner of transportation. [The action] Any final decision of the [mayor] Commissioner of Transportation or the Mayor's License Commission shall be subject to judicial review in accordance with applicable law. In the event that the commissioner of transportation fails to act within two business days after the date upon which the application was filed, or the Mayor's License Commission fails to act within two business days of the conclusion of a hearing held under this section, said application for a permit shall be deemed approved and the permit deemed granted in conformance with the application.

j. Upon the filing of an application to conduct an athletic event, the commissioner of transportation shall investigate the facts set forth in the application and determine:

(1) The amount, if any, to be tendered to the city of

Chicago by the applicant to compensate the city for the provision of any city services deemed necessary by the commissioner for the safe and orderly conduct of the athletic event; and

(2) The amount, if any, of any bond or insurance, naming the city of Chicago as the insured, that the commissioner determines is necessary to insure the city against any liability arising from the athletic event.

No athletic event permit shall be issued until such fees are paid or bonds furnished. The commissioner shall adopt rules and regulations to govern the determination of whether any fees or bonds are required and the amount of any such fees or bonds.

k. The commissioner of transportation shall inform such applicant for an athletic event permit whether the application is approved or disapproved within 30 days after the filing thereof. If the commissioner approves the application, he or she shall inform the applicant within such time of the compensation, insurance or bond, if any, required pursuant to subsection *(j)*. If the commissioner disapproves the application, the commissioner shall provide written notice of his or her action within such time, stating the specific facts and conclusions which are the basis for his or her denial of the permit. If the commissioner fails to act within 30 days after the date upon which the application was filed, said application for an athletic event permit shall be deemed approved and the permit deemed granted in conformance with the application.

l. The commissioner of transportation in denying an

application for a parade, public assembly or athletic permit shall [be empowered to] authorize the conduct of a parade, public assembly or athletic event on a date, at a time, at a location, or over a route different from that named by the applicant. This alternate permit shall to the extent practicable authorize an event that will have comparable public visibility and a similar route, location and date to that of the proposed event. An applicant desiring to accept an alternate parade, public assembly or athletic event permit shall, within two business days after notice of the action by the commissioner, file a written notice of acceptance with the commissioner. An alternate parade, public assembly or athletic event permit shall conform to the requirements of and shall have the effect of a parade, public assembly or athletic event permit.

The commissioner is empowered to limit the parade, public assembly or athletic event to the sidewalk or to one or more traffic lanes of the street where it is determined that such limited area is capable of accommodating the number of people anticipated based upon the information submitted by the applicant and the experience of previous comparable events. In the event that the number of persons in attendance exceed anticipated levels, members of the Police Department are authorized to make reasonable accommodation to increase the portion of the public way made available in order to preserve public health and safety.

If the commissioner denies an application for failure to provide sufficient information about the proposed route or crowd estimate, he shall specify what additional information must be provided in a new or amended application.

m. Immediately upon the receipt of an application for a parade, public assembly or athletic event permit, the commissioner of transportation shall send a copy thereof to the following:

(1) The office of the mayor;
(2) The department of police;
(3) The fire department;
(4) The department of law;
(5) The Chicago Transit Authority;
(6) The Chicago Park District;
(7) The mayor's office of special events;
(8) The alderman of the ward or wards in which the parade, public assembly or athletic event is to be held;
(9) The department of streets and sanitation's ward or wards in which the parade, public assembly or athletic event is to be held; and
(10) The chairman of the appropriate committee of the city council of the city of Chicago.

(11) The Director of the Commission on Animal Care and Control, if the application indicates that live animals will be included in the parade, public assembly or athletic event.

n. The commissioner of transportation, in consultation with other city departments and agencies, shall promulgate rules and regulations to implement this section.

o. Any person who knowingly interferes with any other person or organization lawfully conducting a parade, public assembly or athletic event or any person violating any of the provisions of this ordinance shall be subject to incarceration for up to 10 days and fined not less

than $5.00 nor more than $500.00.

SECTION 2. This ordinance shall take effect 10 days after passage and publication.

Supreme Court, U.S.
FILED
JUL 12 2001
OFFICE OF THE CLERK

No. 00-1839

In The Supreme Court of the United States

ROBERT MACDONALD, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether an ordinance that requires a permit for demonstrations and other events that will obstruct the public ways, and that limits municipal officials to consideration of criteria addressed to only the time, place, and manner of the proposed event when acting on permit applications, is a prior restraint on speech within the meaning of the First Amendment.

2. Whether an ordinance granting licensing authorities discretion to evaluate the time, place, and manner of proposed events that will obstruct the public ways under identified criteria that are unrelated to the content of anyone's speech grants effectively unchecked discretion to licensing authorities in violation of the First Amendment.

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In The Supreme Court of the United States

No. 00-1839

ROBERT MACDONALD, *et al.*,
Petitioners,

v.

CITY OF CHICAGO,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT IN OPPOSITION

STATEMENT

Chicago's parade permit ordinance requires a permit from Chicago's Department of Transportation for any "parade," defined as any march or procession that "does not comply with normal and usual traffic regulations or controls," Municipal Code of Chicago, Ill. § 10-8-330(a)(1) (2000), or any "public assembly," defined as "a company of persons which is reasonably anticipated to obstruct the normal flow of traffic upon the public way and that is collected together in one place," *id.* § 10-8-330(a)(2). See *id.* § 10-8-330(b).[1] Under the ordinance, permit applications must be filed not less than seven business days before the proposed event. See

[1] The pertinent ordinance is reproduced in the appendix to the petition for a writ of certiorari. See Pet. App. 104a-114a.

id. § 10-8-330(c). The application must contain the name, address, and telephone number of the person signing the application and the other authorized and responsible leaders of the organization conducting the event; the date and time of the proposed event; the location of the proposed assembly and disbanding areas; the approximate number of persons expected to participate in the event and the basis on which the estimate is made; and the proposed route including the sidewalks or lanes of traffic it will occupy. See *id.* § 10-8-330(e). The Commissioner of Transportation must then act upon the application within two business days. See *id.* § 10-8-330(i).

Under the ordinance, the Commissioner of Transportation must issue a permit when the Commissioner finds that:

> (1) The proposed activity will not substantially or unnecessarily interfere with the traffic in the area contiguous to the activity or that if the activity will substantially interfere with such traffic, there are available at the time of the proposed activity sufficient City resources to mitigate the disruption;
>
> (2) There are available . . . a sufficient number of police officers to police and protect lawful participants in the activity and non-participants from traffic related hazards in light of the other demands for police protection at the time of the proposed event or activity;
>
> (3) The concentration of persons, animals, vehicles, or things at the assembly and disbanding areas and along the parade . . . route will not prevent proper fire and police protection or ambulance service;
>
> . . . .
>
> (8) the application contains sufficient information about the proposed route and crowd estimate to enable the Commissioner to evaluate the proposed event under this section.

Municipal Code of Chicago, Ill. § 10-8-330(h) (2000). If the Commissioner disapproves an application, the Commissioner must "provide by facsimile transmission or telephonically and by mail directed to the applicant within two business days after the date upon which the application was filed, notice of his or her action, stating the facts and conclusions which are the basis for his or her denial of the permit." *Id.* § 10-8-330(i). Any aggrieved applicant may appeal to the Mayor's License Commission, which must hold a hearing within three business days and then either affirm or reverse the Commissioner's decision. *Id.* Any final decision on an application "shall be subject to judicial review in accordance with applicable law." *Id.*[2] If either the Commissioner or the Mayor's License Commission fails to act on an application within the time allowed by the ordinance, an "application for a permit shall be deemed approved and the permit deemed granted in conformance with the application." *Id.* Moreover, "[i]f the Commissioner denies an application for the failure to provide sufficient information about the proposed route or crowd estimate, he shall specify what additional information must be provided in a new or amended application." *Id.* § 10-8-330(*l*). In addition, whenever the Commissioner denies an application, he must also issue an alternate permit for an event which "shall to the extent practicable authorize an event that will have comparable visibility and a similar route, location and date to that of the proposed event." *Id.*

Robert MacDonald was an "activist" who organized marches advocating the legalization of marijuana. *See* Pet. App. 52a.[3] He filed this suit challenging the constitutionality

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[2] Judicial review of municipal permitting decisions is reviewable under Illinois law by common law certiorari. See, *e.g.*, *Graff v. City of Chicago*, 9 F.3d 1309, 1324-25 (7th Cir. 1993) (en banc) (plurality opinion), cert. denied, 511 U.S. 1085 (1994).

[3] MacDonald died during the pendency of the appeal, and the court of appeals granted petitioners Caren Cronk Thomas and the Windy City

of the parade permit ordinance on its face under the First Amendment. See Pet. App. 60a-61a. Ruling on cross-motions for summary judgment, the district court concluded that the criteria in the ordinance did not grant the Commissioner impermissibly broad discretion when acting on permit applications. See Pet. App. 65a-70a. But the court also ruled that the Commissioner's authority to consider whether there are sufficient police officers available to protect marchers amounted to an invalid content-based regulation of speech. See Pet. App. 70a-73a. Further, the court found that the ordinance's failure to require the licensing authorities to initiate judicial proceedings to review a decision denying a permit application and to bear the burden of proof in those decisions created an invalid prior restraint. See Pet. App. 74a-77a.[4]

The court of appeals reversed the judgment of the district court to the extent that it had invalidated portions of the Chicago ordinance.[5] The court rejected petitioners' claim that the ordinance granted impermissible discretion to the Commissioner, finding that the ordinance specified legitimate criteria for acting upon license applications. See Pet. App. 16a-20a. The court also concluded that because the ordinance regulated the time, place, and manner of speech, it should not

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Hemp Development Board leave to substitute as plaintiffs. See Pet. App. 6a. The petition's identification of MacDonald as a party accordingly is incorrect.

[4] While the case was on appeal, the City filed a motion to vacate the injunction based on various amendments that had been made to the ordinance at issue. See Pet. App. 83a. The district court denied that motion, concluding that the amendments did not cure the constitutional infirmities that the court had identified. See Pet. App. 84a-90a.

[5] The court found that because the ordinance had been amended, petitioners' claims with respect to the earlier version of the ordinance were moot, and only the ordinance as amended was properly before the court. See Pet. App. 11a-12a. Petitioners do not contest that ruling in this Court. See Pet. i.

be treated as a prior restraint on speech. See Pet. App. 20a-28a. The court added that the ordinance properly regulated speech, since it did not permit consideration of the content of speech and was narrowly tailored to advance legitimate governmental interests. See Pet. App. 28a-33a. Finally, the court held that this content-neutral licensing ordinance need not supply the elaborate procedural safeguards required when a prior restraint is at issue. See Pet. App. 34a-39a.[6]

ARGUMENT

The decision of the court of appeals was correct. Indeed, the result below was compelled under this Court's decision in *Cox v. New Hampshire*, 312 U.S. 569 (1941), which held that laws requiring marchers to obtain permits should be upheld when they reasonably regulate the time, place, and manner of expression, even if they permit licensing officials to make discretionary judgments about when and where public assemblies should take place.

As the court of appeals recognized, however, the decision below is in conflict with decisions in other circuits that have branded even laws directed only at the time, place, or manner of expression as prior restraints. Moreover, to reach the result below, the court of appeals relied on a decision which this Court has since decided to review, *Thomas v. Chicago Park District*, 227 F.3d 921 (7th Cir. 2000), cert. granted, 121 S. Ct. 2191 (2001) (No. 00-1249). Although, as we explain below, the ordinance at issue in *Thomas* differs in a number

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[6] Judge Rovner dissented in part, disagreeing with the court's holding that the ordinance was content neutral. In her view, the Commissioner's authority to consider whether adequate police resources are available to protect marchers with respect to traffic-related hazards effectively created content-based regulation, since the Commissioner could conclude that marches that provoke a hostile audience reaction could provoke greater traffic-related hazards, and for that reason the ordinance created a type of "heckler's veto" forbidden by the First Amendment. See Pet. App. 43a-50a.

of critical respects from the ordinance at issue here, there is nonetheless a sufficient relationship between this case and *Thomas* that the Court will likely wish to hold this petition pending its decision in *Thomas*. Nevertheless, only the broadest and most radical positions pressed by the petitioners in *Thomas* would even hint at a basis for reversing the court of appeals in this case. Accordingly, after its decision in *Thomas*, unless the Court has embraced the broadest arguments pressed by the petitioners in that case, the petition for certiorari should be denied. To the extent that the decision in *Thomas* does not resolve the confusion in the lower courts on any of the questions presented by the petition in this case, and the Court deems the questions presented in the petition worthy of plenary review, the Court should then grant the petition.

1. Central to all of the arguments pressed by petitioners is their view that the First Amendment ordinarily forbids licensing laws that vest even a modicum of discretion in licensing authorities. For example, petitioners argue that the First Amendment "condemn[s] the inclusion of discretion in ordinances requiring a permit to engage in free speech . . . ." Pet. 20. This view finds no support in this Court's precedents. To the contrary, it is settled that laws empowering licensing officials to regulate the time, place, and manner of expression are constitutionally sound.

The statute at issue in *Cox v. New Hampshire*, like the ordinance at issue here, required demonstrators to obtain a permit before they could lawfully march on public streets. To obtain a permit, applicants were obligated to provide licensing officials with sufficient advance notice "so as to afford opportunity to afford proper policing." 312 U.S. at 576. Thereafter, licensing officials were authorized to fix the time and place of a march "to prevent confusion by overlapping parades or processions, to secure convenient use of the streets by other travelers, and to minimize the risk of

disorder," and a permit would be issued only "if after a required investigation it was found that the convenience of the public in the use of the streets would not thereby be unduly disturbed, upon such conditions or changes in time, place, and manner as would avoid disturbance." *Ibid.* This Court upheld the statute, reasoning:

> If a municipality has authority to control the use of its public streets for parades and processions, as it undoubtedly has, it cannot be denied authority to give consideration, without unfair discrimination, to time, place and manner in relation to the other proper uses of the streets. We find it impossible to say that the limited authority conferred by the licensing provisions of the statute in question as thus construed contravened any constitutional right.

Ibid.

Since *Cox*, this Court has never deviated from the rule that licensing laws may reasonably regulate the time, place, or manner of expressive activities. Thus, in *Ward v. Rock Against Racism*, 491 U.S. 781 (1989), the Court upheld a sound regulation for public concerts requiring "the best sound for all events," and providing that event organizers "ensure appropriate sound quality balanced with respect for nearby residential neighbors and the mayorally decreed quiet zone of [the] Sheep Meadow." *Id.* at 794. The Court acknowledged that these standards required the exercise of discretion, but found that discretion unobjectionable: "While these standards are undoubtedly flexible, and the officials implementing them will exercise considerable discretion, perfect clarity and precise guidance have never been required of regulations that restrict expressive activity." *Id.*

In short, discretion that is confined to evaluating the time, place, or manner of expression does not render a law subject to facial invalidation under the First Amendment. Only when

the discretion conferred by a challenged enactment enables the government to discriminate between favored and disfavored speakers can it properly be invalidated without reference to the manner in which it has been applied to the party challenging it. As the Court explained in *City of Lakewood v. Plain Dealer Publishing Co.*, 486 U.S. 750 (1988), "a facial challenge lies whenever a licensing law gives a government official or agency substantial power to discriminate based on the content or viewpoint of speech by suppressing disfavored speech or disliked speakers." *Id.* at 759. By contrast, as *Cox* and its progeny illustrate, this Court has not indulged facial challenges when a law fails to grant government officials this type of content-based discretion, but merely allows the exercise of discretion with respect to the time, place, and manner in which expressive activities are to take place.

2. Petitioners claim that "a prior restraint analysis [must] be applied to all statutes, ordinances, rules and regulations requiring a permit before citizens may be heard . . . ." Pet. 14. But *Cox* itself upheld a licensing law directed only at the time, place, and manner of expression, and even petitioners do not claim that any subsequent decision of this Court has cast the slightest doubt on the vitality of *Cox*. To the contrary, this Court has repeatedly explained that only laws that forbid speech altogether, rather than regulating it, should be characterized as prior restraints. In *Rock Against Racism*, for example, the Court emphatically rejected an argument that the sound guideline at issue constituted a prior restraint, observing that the guideline "grants no authority to forbid speech, but merely permits the city to regulate its volume to the extent necessary to avoid excessive noise." 491 U.S. at 795 n.5. Similarly, in *Hill v. Colorado*, 530 U.S. 703 (2000), the Court held that a statute restricting protest activity near health care facilities was not a prior restraint, explaining: "Under this statute, absolutely no channel of

communication is foreclosed. No speaker is silenced. And no message is prohibited." *Id.* at 734.

Nor is the existence of discretion in a licensing law enough to brand it a prior restraint. As we explain above, the existence of licensing discretion makes a law vulnerable to facial challenge only when it permits the government to prohibit speech based on an evaluation of its content. In *Freedman v. Maryland*, 380 U.S. 51 (1965), for example, on which petitioners place their primary reliance, the statute at issue allowed a state board to view all films prior to their exhibition and to prohibit the exhibition of films that "are obscene, or such as tend, in the judgment of the Board, to debase or corrupt morals or incite to crimes." *Id.* at 52 n.2. The Court noted the "peculiar dangers" of "a censorship system": "Because the censor's business is to censor, there inheres the danger that he may well be less responsive than a court—part of an independent breach of government—to the constitutionally protected interests in free expression." *Id.* at 57 (footnote omitted). The Court therefore required rigorous procedural protections "to obviate the dangers of a censorship system." *Id.* at 58. The Court held that to comport with the First Amendment, licensing officials must bear the burden of proving that a film is constitutionally unprotected, their decisions can restrain exhibition of a film only during a specified brief period of time in which the officials must initiate judicial review, and a prompt judicial decision must be assured. See *id.* at 58-59.

Since *Freedman*, this Court has imposed the complicated and burdensome procedures mandated in that case only on laws that permit officials to censor disfavored speech in the same fashion as the system at issue in that case. For example, laws granting licensors entirely unfettered discretion to decide whether to issue licenses are treated as prior restraints because they create a risk of censorship identical to the system at issue in *Freedman*: "without standards governing

the exercise of discretion, a government official may decide who may speak and who may not based on the content of the speech or viewpoint of the speaker." *City of Lakewood*, 486 U.S. at 763. See, *e.g.*, *Forsyth County v. Nationalist Movement*, 505 U.S. 123, 132-33 (1992); *Shuttlesworth v. City of Birmingham*, 394 U.S. 147, 150-51 (1969). Laws that do not require licensing officials to act on applications within a specified period of time suffer from the same defect, since "[w]here the licensor has unlimited time within which to issue a license, the risk of arbitrary suppression is as great as the provision of unbridled discretion." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 226-28 (1990) (plurality opinion). See, *e.g.*, *id.* at 238-42 (Brennan, J., concurring in the judgment); *Riley v. National Federation of the Blind of North Carolina, Inc.*, 487 U.S. 781, 801-02 (1988). But the prior restraint doctrine has never been applied outside of these contexts.

Petitioners nevertheless claim that in *FW/PBS* this Court applied prior restraint doctrine to a licensing law that did not permit officials to act on the basis of content of speech. See Pet. 11-12. To be sure, a majority of the Court characterized the ordinance at issue in *FW/PBS* as a prior restraint, but that was because the ordinance did not require licensing officials to act within a specified period of time, as we explain above. The plurality, for example, wrote that "like a censorship system, a licensing scheme creates the possibility that constitutionally protected speech will be suppressed *where there are inadequate procedural safeguards to ensure prompt issuance of the license*." 493 U.S. at 226 (emphasis supplied). Nevertheless, while the plurality's opinion in that case is not entirely free from ambiguity, a majority of the Court unquestionably concluded that *Freedman* was inapplicable to the Dallas ordinance. The three-Justice plurality, for example, concluded that when licensing decisions must be made within a specified period of time and judicial review is available, *Freedman* did not apply to the

licensing system at issue: "We conclude that the First Amendment does not require the city to bear the burden of going to court to effect the denial of a license application or that it bear the burden of proof once in court." 493 U.S. at 230.[7] Three other Justices also rejected application of prior restraint doctrine to the Dallas ordinance, concluding that it created no impermissible risk of censorship of protected speech. See *id.* at 246-48 (White, J., joined by Rehnquist, C.J., concurring in part and dissenting in part) (relying on ordinance's content neutrality); *id.* at 259-64 (Scalia, J., concurring in part and dissenting in part) (construing ordinance as regulating pandering and not protected speech). Thus, no decision of this Court has ever applied *Freedman*'s elaborate procedural rules to a content-neutral licensing law.

Accordingly, the court of appeals correctly rejected petitioners' view that even content-neutral regulation of the time, place, or manner of speech should be considered a prior restraint. Laws of this character continue to be governed by *Cox*. And even aside from precedent, there is simply no warrant for applying prior restraint doctrine to the ordinance at issue here. That doctrine—by requiring the licensing authority to initiate judicial review, to bear the burden of proof in a de novo judicial proceeding, and to preserve the status quo until a prompt judicial decision issues—effectively makes judges the actual decisionmakers on license applications. Under *Freedman*, licensing decisions are of no effect if licensing officials cannot convince a judge that they are correct. But when a licensing official is authorized to act only on legitimate and content-neutral criteria, there is no justification to transfer licensing authority to the judiciary.

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[7] The plurality added that the First Amendment required no more than that judicial review be available: "there must be the possibility of prompt judicial review in the event that [a] license is erroneously denied." 493 U.S. at 228.

The ordinance at issue here, moreover, contains the type of legitimate and content-neutral criteria that *Cox* and its progeny hold may be utilized in licensing laws. The ordinance identifies only legitimate criteria for decision unrelated to the content of speech—criteria appropriately based upon the impact of a proposed event on traffic flow and police and fire service. The ordinance silences no one; it governs only the time, place, and manner of expression. Similarly, it disqualifies no one from receiving a permit, requires that decisions be made within specified time periods, and guarantees applicants whose requests are denied an alternate permit for an event as similar as practicable to the original proposal. This ordinance prevents no speech; it merely regulates when and where speech will occur. That has never before been thought to constitute a prior restraint.

3. Petitioners also claim that various provisions of the ordinance delegate impermissibly broad discretion to the Commissioner of Transportation. They point to the requirement that the Commissioner consider whether a proposed event will "substantially or unnecessarily interfere with traffic," whether there are "a sufficient number of peace officers to police and protect lawful participants in the activity and non-participants from traffic related hazards," and whether the proposed event would create a "concentration of persons, animals, vehicles or things at the assembly and disbanding areas and along the parade . . . route" that would "prevent proper fire and police protection or ambulance service." See Pet. 19-20. But again, the First Amendment does not condemn all discretion when making licensing decisions; as we explain above, a challenged law should be condemned only when it permits licensing officials to act on the basis of content of speech. And for that reason, "standards limiting the licensor's discretion will eliminate this danger . . . ." *City of Lakewood*, 486 U.S. at 758. The ordinance at issue here contains ascertainable standards that circumscribe licensing discretion and ensure that only the

time, place, and manner of expression will be considered, as the court of appeals correctly concluded. See Pet. App. 16a-20a.[8]

Nothing in this Court's precedents lends support to petitioners' claim that Chicago's ordinance delegates impermissibly broad discretion. In *Boos v. Barry*, 485 U.S. 312 (1988), for example, the Court upheld a law that authorized the police to order demonstrators to disperse whenever they reasonably believe that they threaten to disrupt the "peace and security" of foreign embassies. *See id.* at 332. Similarly, in *Grayned v. City of Rockford*, 408 U.S. 104 (1972), the Court upheld an ordinance that permitted police to halt demonstrations near schools when "normal school activity has been or is about to be disrupted." *Id.* at 112. And as we explain above, the statute upheld in *Cox* also permitted licensing authorities to exercise substantial discretion. The degree of discretionary authority upheld in these decisions

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[8] In addition to challenging the provisions of the ordinance that we discuss above, petitioners also attack the provision in the ordinance permitting the Commissioner to assess whether the application contains sufficient information about the proposed route and crowd estimate to allow the Commissioner to evaluate the proposed event under this section. See Pet. 20. That claim, however, is not properly before this Court because petitioners never advanced it in the district court. See Pet. App. 65a-70a, 100a-101a. Petitioners instead made this argument for the first time on appeal, but since the district court had not enjoined this portion of the ordinance, this was not a proper ground on which to affirm the district court's judgment, and the court of appeals properly declined to reach it. See Pet. App. 14a-20a. In any event, this objection has no more merit than any of the others, since this provision also does not act to silence any speaker. Not only are applicants denied a permit under this provision entitled to an alternate permit, but when an application is denied on this basis, the Commissioner of Transportation must also "specify what additional information must be provided in a new or amended application." Municipal Code of Chicago, Ill. § 10-8-330(*l*) (2000).

differs in no meaningful respect from the scope of discretion contained in Chicago's ordinance.[9]

Indeed, some measure of discretion is essential if the safety of the public is to be protected. Whether the route and size of a proposed event will unduly interfere with ambulance service, for example, is simply not susceptible to a precise formula. Public safety cannot practicably be secured unless

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[9] In the briefest of footnotes, petitioners embrace Judge Rovner's view that the provision in the ordinance permitting consideration of whether there are adequate police resources available to protect participants and onlookers from traffic-related hazards is an impermissible content-based criterion, since it permits consideration of a hostile audience reaction and thus authorizes what amounts to an impermissible "heckler's veto." See Pet. 20 n.16. This argument does not appear to be fairly included in any of the questions presented in the petition. See Pet. i. And in any event, it is based on an unwarranted construction of the ordinance. On its face, the ordinance does not permit consideration of whether sufficient resources are available to protect demonstrators from a potentially hostile audience, but only whether there are resources available "to protect lawful participants in the activity and non-participants from traffic related hazards." Municipal Code of Chicago, Ill. § 10-8-330(h)(2) (2000). The ordinance makes no reference to hostile audience reaction, and petitioners adduced no evidence that it has ever been construed or applied in that fashion. The legitimacy of this criterion should be clear; the potential hazards that traffic poses for demonstrators occupying the public ways unless police are available to cordon off an event are plain. Indeed, at least two other courts have rejected arguments that ordinances permitting consideration of whether sufficient police resources are available to protect participants in a proposed event from traffic-related hazards is impermissible. See *Stonewall Union v. City of Columbus*, 931 F.2d 1130 (6th Cir.), cert. denied, 502 U.S. 899 (1991); *Handley v. City of Montgomery*, 401 So. 2d 171, 180-83 (Ala. Crim. App. 1981). Moreover, construing the ordinance to permit consideration of a hostile audience reaction—when the ordinance itself contains no language mandating consideration of such a criterion—would violate the settled rule that challenged laws should be construed when possible in order to avoid constitutional infirmity. See, *e.g.*, *United States v. X-Citement Video, Inc.*, 513 U.S. 64, 69 (1994); *Frisby v. Schultz*, 487 U.S. 474, 482-83 (1988); *Young v. American Mini Theatres, Inc.*, 427 U.S. 50, 61 (1976).

officials retain at least a modicum of discretion to consider a proposed event's impact upon public safety. The fact that some amount of judgment and discretion must be exercised even when regulating speech within the meaning of the First Amendment simply bows to practical reality. As this Court has observed, "[c]ondemned to the use of words, we can never expect mathematical certainty in our language." *Grayned*, 408 U.S. at 110.

4. Petitioners correctly observe that the holding below on the prior restraint issue is in conflict with decisions in other circuits holding that even content-neutral licensing laws should be evaluated as prior restraints. See Pet. 11, 13, 15-16. This Court has also noted the existence of a split of authority. See *City News & Novelty, Inc. v. City of Waukesha*, 121 S. Ct. 743, 746 (2001). In the decision below, the court of appeals acknowledged that conflict as well. See Pet. App. 25a-26a, 35a-36a.[10] The practical importance of

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[10] The disarray in the case law may not be as aggravated as it appears. Most of the cases that have applied prior restraint doctrine to content-neutral licensing laws involved laws regulating establishments providing sexually oriented entertainment. See, *e.g.*, *Baby Tam & Co. v. City of Las Vegas*, 154 F.3d 1097, 1101-02 (9th Cir. 1998); *11126 Baltimore Boulevard, Inc. v. Prince George's County*, 58 F.3d 998, 999-1000 (4th Cir.) (en banc), cert. denied, 516 U.S. 1010 (1995); *East Brooks Books, Inc. v. City of Memphis*, 48 F.3d 220, 224-25 (6th Cir.), cert. denied, 516 U.S. 909 (1995); *Harkins v. Greenville County*, 533 S.E.2d 886, 891-92 (S.C. 2000), cert. denied, 121 S. Ct. 880 (2001). As the Seventh Circuit has observed, there may be greater justification for applying prior restraint doctrine to those laws, since their applicability is triggered by the content of an applicant's speech. See *Thomas*, 227 F.3d at 927-28. Nevertheless, some courts have declined to apply *Freedman*'s requirement that license applicants be assured of a prompt judicial decision to content-neutral laws that regulate sexually oriented establishments. See, *e.g.*, *Blue Canary Corp. v. City of Milwaukee*, 251 F.3d 1121 (7th Cir. 2001); *Boss Capital, Inc. v. City of Casselberry*, 187 F.3d 1251, 1256-57 (11th Cir. 1999); *TK's Video, Inc. v. Denton County*, 24 F.3d 705, 709 (5th Cir. 1994); *O'Connor v. City and County of Denver*, 894 F.2d 1210, 1220-21 (10th Cir. 1990); *Fantasy Book Shop, Inc. v. City of Boston*, 652 F.2d 1115, 1120-21

the questions presented here is also clear; permit requirements like the one at issue here are ubiquitous—no doubt at least in part because this Court blessed them in *Cox*—and if local governments must now comply with *Freedman* whenever they fail to grant applicants everything they seek, the practical difficulties facing local officials will be enormous, as the court of appeals observed. See Pet. App. 38a-39a. And presumably because of the conflicting results in the lower courts and the importance of this issue, the Court has granted

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(1st Cir. 1981); *P.M. Realty & Investments, Inc. v. City of Tampa*, 779 So. 2d 404, 407-08 (Fla. Dist. Ct. App. 2000). But regardless of whether cases involving licensing laws for sexually oriented businesses can be distinguished from cases like this one, we acknowledge that the decision below, while consistent with a number of other decisions, see, *e.g.*, *Jews for Jesus, Inc. v. Massachusetts Bay Transportation Authority*, 984 F.2d 1319, 1326-28 (1st Cir. 1993); *Handley*, 401 So. 2d at 180-83; *State v. Frinks*, 201 S.E.2d 858 (N.C. 1974); *Outdoor Media Dimensions, Inc. v. State*, 945 P.2d 614, 623-24 (Or. Ct. App. 1997), aff'd on other grounds, 20 P.3d 180 (Or. 2001), cannot be reconciled with the Eleventh Circuit's application of prior restraint doctrine to a public congregation ordinance that the court found to be content neutral. See *Cannabis Action Network v. City of Gainesville*, 231 F.3d 761, 774-76 (11th Cir. 2000), petition for cert. filed, 69 U.S.L.W. 3657 (U.S. March 29, 2001) (No. 00-1503). Less clear is whether the decision below is in conflict with the law in the Second Circuit, which the court of appeals understandably characterized in the decision below as "unclear." Pet. App. 36a. In *Beal v. Stern*, 184 F.3d 117 (2d Cir. 1999), the court remanded the case to the district court for a determination whether the administration of the ordinance at issue reflected excessive discretion, but added that under a content-neutral law, the government need not bear the burden of initiating judicial review. See *id.* at 126-29. While that approach appears consistent with the decision below, the court also characterized any licensing law as a prior restraint no matter how confined the discretion that it confers. See *id.* at 124, 128. The court took the same approach in *MacDonald v. Safir*, 206 F.3d 183, 194-95 (2d Cir. 2000). The Tenth Circuit has also made this error, even though it upheld the law before it. See *American Target Advertising, Inc. v. Giani*, 199 F.3d 1241, 1253-54 (10th Cir.), cert. denied, 531 U.S. 811 (2000).

plenary review in *Thomas*, which was relied upon by the court of appeals in the decision below.

To be sure, it is far from clear that even a decision by this Court to reverse in *Thomas* will shed much light on the correct resolution of this case. The ordinance at issue in *Thomas* renders certain applicants altogether ineligible for permits. See 227 F.3d at 924-25. For that reason, the Court might treat the ordinance as a prior restraint or find it otherwise impermissible under the First Amendment, rather than upholding it as a regulation of time, place, or manner of speech. Such a ruling would not bear on the ordinance at issue in this case, which renders no one ineligible for a permit, and silences no one either. Only if this Court embraces the broadest arguments advanced by the petitioners in *Thomas*, and holds that any licensing or permit law involving expressive activities is governed by *Freedman*, will the decision in that case bear on this one. Nevertheless, given the relationship between the issues presented in *Thomas* and those presented in the instant petition, the Court likely will wish to hold this petition pending its decision in *Thomas*. At that point, should the judgment in *Thomas* be affirmed, the Court should deny the petition for a writ of certiorari. Should the judgment be reversed, it may be appropriate at that point for the Court to grant plenary review or, in the event that the Court reverses in *Thomas* in a holding sufficiently broad to bear on this case, to remand the case to the court of appeals for reconsideration.

CONCLUSION

The petition for a writ of certiorari should be held pending this Court's decision in *Thomas*.

Respectfully submitted,

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